Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; and SOCORRO SOZA,

Petitioners,

v.

ITT CORPORATION, a Delaware corporation, dba ITT CANNON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where a party fails to demand a trial by jury within the time limits provided by Rule 38(d) F.R.C.P., but thereafter requests a trial by jury, does the Court have discretion, under Rule 39 (b) F.R.C.P., to deny such a request, in the absence of compelling circumstances supporting such a denial?

2. In the absence of substantial prejudice to other parties or interference with the administrative scheduling concerns of the Court, is it a violation of the Seventh Amendment for a Court to deny a party's Rule 39(b) motion for a jury trial?

3. What standard should be applied by a court in weighing a late request for a jury trial under Rule 39(b) F.R.C.P.?

4. If Rule 39(b) F.R.C.P. is not to be construed to generously grant relief for an inadvertent waiver, does Rule 38(d) F.R.C.P., violate the Constitution by providing for the loss of the Seventh Amendment right to trial by jury in civil cases, without a knowledgeable, affirmative waiver of such right?

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BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit, which is the subject of this Petition, was entered on June 9, 1999 and affirmed the District Court's denial of Petitioners' demand for a jury trial. This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals by *writ of certiorari* pursuant to 28 U.S.C. § 1254(1).

Because the constitutionality of an act of Congress is at issue here, 28 U.S.C. § 2403(a) may apply. Accordingly, pursuant to Supreme Court Rule 29, para. 4(b), this Petition has been served on the Solicitor General of the United States.

Neither the U.S. District Court for the District of Arizona nor the U.S. Court of Appeals for the Ninth Circuit has certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), that the Constitutionality of an Act of Congress has been drawn into question.

CONSTITUTIONAL PROVISION AND RULES INVOLVED IN THE CASE

Civil Trials

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment VII, Constitution of the United States

Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In the demand, a party may specify the issues which the party wishes so tried; otherwise, the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial

by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 39. Trial by Jury or by the Court

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury, the court,

> upon motion or of its own initiative, may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.
>
> *Federal Rules of Civil Procedure*

STATEMENT OF THE CASE

This is an action initially brought in the U.S. District Court for the District of Arizona, based on diversity of citizenship and an amount in controversy exceeding $50,000, pursuant to 28 U.S.C. § 1332. Petitioners' action for damages was based upon breach of an implied-in-fact contract created by promises made in an employees' handbook that layoff and recall decisions would be based upon seniority. Due to inadvertence, Petitioners failed to demand a jury trial within the time limits provided by Rule 38(d). Upon discovery of the oversight, Petitioners filed a motion for relief in accordance with the provisions of Rule 39(b) F.R.C.P. **(Appx. A)** The U.S. District Court below, in its order dated March 9, 1995, denied Plaintiffs' request for a jury trial. **(Appx. B)**

The U.S. District Court granted Respondent's Motion for Summary Judgment. Petitioner filed a timely appeal, including an appeal of the denial of the request for trial by jury, to the Ninth Circuit Court of Appeals, which had jurisdiction based upon 28 U.S.C. § 1291. The Ninth Circuit certified certain questions of law to the Arizona

Supreme Court, which filed its answer to the certified questions on May 25, 1999. On June 9, 1999, the Ninth Circuit, in an unpublished order, reversed the judgment of the U.S. District Court on the substantive issues, but affirmed the U.S. District Court's denial of Petitioners' demand for a jury trial. **(Appx. C)**

REASONS FOR GRANTING THE WRIT

This case involves the Constitutionality of the waiver provisions of Rule 38(d) and the "judicial discretion" standard of Rule 39(b) of the Federal Rules of Civil Procedure. The Circuits are now so hopelessly divided in interpreting Rule 39(b) that citizens are being denied their Seventh Amendment right to a trial by jury based upon nothing more than the fortuitous circumstance of their geographical location.

The Court should accept this case to establish uniform guidelines for the Federal Circuits and lower courts in interpreting Rule 39(b) of the Federal Rules of Civil Procedure, guidelines that would strike a balance between the interests of preserving and protecting the Constitutional rights of litigants and preventing any potential prejudice that a late request for a jury trial might bring to other parties or to the Court's schedule. This case presents a unique opportunity for this Court to bring uniformity to this issue and elevate the rights provided by the Seventh Amendment to a status equal to other Constitutional rights that cannot be inadvertently waived.

I. The decisions of the various circuits are in conflict regarding the standard for granting relief under Rule 39(b).

Courts in the First, Fifth, Seventh, and Tenth Circuits interpret Rule 39(b) to require the exercise of discretion in favor of a trial by jury unless significant prejudice to other parties or to the Court is shown. *Lewis v. Thigpen*, 767 F.2d 252, 259 (5th Cir. 1985); *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Swofford v. B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965); *Merritt v. Faulkener*, 697 F.2d 761 (7th Cir. 1983); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1187 (7th Cir. 1992).

On the other hand, the Second, Fourth, and Ninth Circuits cling tenaciously to a policy of denying Rule 39(b) motions for an inadvertent late filing unless compelling special circumstances are shown. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983); *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976); *Pacific Queen Fisheries v. Symes*, 307 F.2d 700, 718-19 (9th Cir. 1962); *Rutledge v. Electric Hose & Rubber Company*, 511 F.2d 668, 675 (9th Cir. 1975); *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447, 449 (9th Cir. 1960); *Beckham v. Safeco Ins. Co.*, 691 F.2d 898 (9th Cir. 1982); *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 70 (2nd Cir. 1967); *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 393 (2nd Cir. 1983); *General Tire and Rubber Co. v. Watkins*, 331 F.2d 192, 197-198 (4th Cir. 1964). In the Ninth Circuit, denial of one's right to trial by jury when there has been a late request due to inadvertence is so

rigidly enforced that no discretion is permitted. *Russ v. Standard Ins. Co.*, 120 F.3d 988 (9th Cir. 1997).

Similarly, U.S. District Courts in the respective circuits have taken divergent positions, either interpreting Rule 39(b) in a manner granting a trial by jury, *Milliken and Co. v. Shaw Indus., Inc.*, 978 F.Supp. 1155 (D.C. Ga. 1997); *Truesdell v. State Farm Fire and Cas. Co.*, 960 F.Supp. 1511 (D.C. Okl. 1997); *Thompson v. Fritsch*, 172 F.R.D. 269 (D.C. Mich. 1997); *Goff v. Owen Healthcare, Inc.*, 166 F.R.D. 492 (D.C. Kan. 1966); *Credit Bureau of Council Bluffs v. Credit Bureau Data Centers, Inc.*, 143 F.R.D. 206 (Iowa, 1992); *E.E.O.C. v. Britrail Travel Int'l Corp.*, 129 F.R.D. 116 (D.C. N.J. 1989); *Ford v. Breier*, 71 F.R.D. 195 (D.C. Wis. 1976); *Megadyme Medical Prods. v. Aaron Medical Indus.*, 170 F.R.D. 28 (D.C. Utah 1996), or routinely denying such requests, unless there are compelling reasons to grant it. *Wise v. Lanham*, 171 F.R.D. 187 (D.C. Md. 1997); *Gelardi v. TransAmerica Occidental Life Insurance Co.*, 163 F.R.D. 495, 496 (D.C. Va. 1995); *Baker v. Amtrak Corp.*, 163 F.R.D. 219 (D.C. N.Y. 1995); *Gamboa v. Medical College of Hampton Roads*, 160 F.R.D. 540 (D.C. Va. 1995).

II. The waiver of a Constitutional right should be a knowledgeable waiver and not an unintentional or inadvertent one.

Rule 38(d) F.R.C.P., in its present form, permits an unintentional waiver of the Seventh Amendment right to trial by jury. It is for this reason that Rule 39(b), F.R.C.P. should be interpreted, whenever possible, to restore one's Constitutional right where an inadvertent waiver has occurred. Although any Constitutional right may be

waived, a waiver of such a fundamental right should be based upon a *knowledgeable* waiver and not an unintentional or inadvertent one. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 2395-96, 101 L.Ed.2d 261 (1988); *Johnson v. Zerbst*, 304 U.S. 458, 464, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed. 2d 562 (1975); *Edwards v. Arizona*, 451 U.S. 477, 483-485, 101 S.Ct. 1880, 1884-85, 68 L.Ed. 2d 378 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 95, 92, S.Ct. 1983, 2002, 32 L.Ed. 2d 556 (1972); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S.Ct. 775, 782, 31 L.Ed. 2d 124 (1972); *White v. White*, 925 F.2d 287 (9th Cir. 1991); *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987); *Davis Oil Co. v. Mills*, 873 F.2d 774, 787, 788 (5th Cir. 1989); *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1095 (3rd Cir. 1988).

III. A waiver of a Constitutional right must be by clear and compelling evidence.

Waivers of Constitutional rights are not favored. The courts have almost uniformly declared that a waiver of a Constitutional right must be established by "clear" and "compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986, 18 L.Ed. 2d 1094 (1967); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 & n.14 (3rd Cir. 1976); *Miranda v. State of Arizona*, 86 S.Ct. 1602, 384 U.S. 436, 475, 16 L.Ed. 2d 694 (1966); *U.S. v. Provencio*, 554 F.2d 361 (9th Cir. 1977). Outside of those cases interpreting Rule 39(b) F.R.C.P., one is hard pressed to find any authority for the proposition that any other

Constitutional right can be waived by oversight or inadvertence.

IV. Rule 39(b), when reasonably construed, can prevent inadvertent waivers.

If reasonably construed, Rule 39(b) F.R.C.P., can operate as an important safeguard against an irretrievable, inadvertent waiver of the right to trial by jury. The better-reasoned cases and other legal authorities, recognize the beneficent purposes of Rule 39(b) and have taken pains to preserve the benefits of this important Constitutional right, unless the delay results in prejudice to other parties or to the administrative scheduling concerns of the court. *Lewis v. Thigpen, supra; AMF Tuboscope Inc., v. Cunningham, supra; Merritt v. Faulkener, supra; Wright & Miller,* Federal Practice and Procedure: Civil 2d § 2334, P.189; *Comment, Discretion of Court to Set Aside Waiver of Jury Trial Under Federal Rule 39(b),* 47 Iowa Law Review 759 (1962). Similarly, the decisions of state courts which have rules similar to Rule 38 and Rule 39 of the F.R.C.P., have supported the right to trial by jury where there is a doubt as to whether a waiver is intended. *Loiselle v. Gladfelter,* 160 So.2d 740, 740 (Fla. 1964); *Patterson v. McNeill – Patterson & Assoc., Inc.,* 441 S.E.2d 328, 329 (S.C. App. 1994); *REW Construction Co., v. District Court of Third Judicial Dist.,* 400 P.2d 390, 401 (Idaho 1965).

The interpretation of Rule 39(b) prevailing in the First, Fifth, Seventh, and Tenth Circuits is consistent with preserving the Constitutional right of trial by jury and provides protection against a waiver of one's rights due to oversight, inadvertence, or neglect. Such a policy is

consistent with elevating the Constitution and the preservation of our Constitutional rights, whereas the contrary policy prevailing in the Second, Fourth, and Ninth Circuits diminishes our Constitution by relegating it to a position subservient to the Federal Rules of Civil Procedure without any equivalent, countervailing benefit. Taken to its logical (or illogical) extreme, the legislative or judicial branches could similarly achieve the inadvertent waiver of other valuable Constitutional rights simply by the enactment of waiver provisions in legislative acts or in court rules, a process that would entirely undermine the principles of Constitutional supremacy.

The Seventh Amendment is an integral part of our Bill of Rights and was thought by our Founding Fathers to be essential to the preservation of our freedoms and a shield against tyranny. *Alexander Hamilton, The Federalist,* No. LXXXIII, P.139. The right of our citizens to trial by jury should occupy a far higher level than suggested in the decisions of our courts which so narrowly construe Rule 39(b).

V. Uniform guidelines for Rule 39(b) should be established by this Court.

The Eleventh Circuit steers a middle course between those circuits which either favor or oppose granting relief where, thru inadvertence, there is a late request for a jury trial. *Parrott v. Wilson,* 707 F.2d 1262 (1983); *Sullivan v. School Board of Pinellas County,* 773 F.2d 1182 (11th Cir. 1985). Five helpful guidelines have been developed by the Eleventh Circuit for lower courts to follow in exercising their discretion under Rule 39(b). They are:

1. Whether the case involves issues traditionally tried by a jury;

2. Whether granting the motion would disrupt the Court's or the adverse parties' schedule;

3. Whether the adverse party will be prejudiced;

4. How long the moving party delayed in bringing the motion.

5. Why the moving party failed to file a timely demand for a jury trial.

Similarly, uniform guidelines should be adopted by this Court for the guidance of lower courts in acting upon Rule 39(b) requests, so that the Constitutional rights of litigants will not fortuitously depend upon the Circuit or Judicial District in which one happens to be.

CONCLUSION

Although most litigants take their Seventh Amendment right to trial by jury for granted, it can easily be lost under the policies adopted by the Second, Fourth, and Ninth Circuits in their interpretation of Rule 39(b). Many *pro se* litigants are, presumably, totally unaware of the waiver provisions of Rule 38(d). In addition, many lawyers who practice predominately in state courts, whose rules require an affirmative act before waiver of a jury trial can occur, may also be largely unaware of the waiver provisions of Rule 38(d), or may not have it sufficiently in mind during their occasional appearance in Federal Court to file a timely request.

Absent the most compelling circumstances, this Court should interpret Rule 39(b) in a manner that would preserve one's Seventh Amendment rights. To the extent that the rigid approach of the Second, Fourth, and Ninth Circuits deprives our citizens of their Constitutional right to trial by jury, such approach should be modified by this Court. Rights secured by the Seventh Amendment should not be easily lost through ignorance or inadvertence nor should their restoration be made dependent upon judicial discretion without clear and uniform guidelines in support of such restoration.

RESPECTFULLY SUBMITTED this 28th day of July 1999.

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APPENDIX

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A. ORDER REVERSING THE JUDGMENT OF THE DISTRICT COURT; DENYING ITT'S REQUEST FOR ATTORNEY'S FEES INCURRED ON APPEAL; AND AFFIRMING THE DISTRICT COURT'S DENIAL OF THE EMPLOYEES' UNTIMELY DEMAND FOR A JURY TRIAL.... A-1

B. MOTION FOR LEAVE TO REQUEST TRIAL BY JURY..... A-3

C. ORDER DENYING PLAINTIFFS' REQUEST FOR TRIAL BY JURY..... A-5

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; SOCORRO SOZA, Plaintiffs-Appellants, v. ITT CORPORATION, a Delaware Corporation dba ITT CANNON, Defendant-Appellee.	No. 96-15520 D.C. No. CV-94-01399-ROS ORDER (Filed Jun. 9, 1999)

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued March 10, 1997
Submitted June 4, 1999
San Francisco, California

Before: WHITE, Associate Justice, Retired;* CANBY and RYMER, Circuit Judges.

This case is submitted as of June 4, 1999.

By order of April 17, 1997 we certified two questions to the Arizona Supreme Court. The Arizona Supreme Court filed an opinion May 25, 1999 answering the two

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* The Honorable Byron R. White, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

certified questions in the negative. Therefore, we reverse the judgment of the district court and remand for further proceedings not inconsistent with the Arizona Supreme Court's opinion; we deny ITT's request for attorneys' fees incurred on appeal; and we affirm the district court's denial of the employees' untimely demand for a jury trial.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

APPENDIX B

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BETTY L. ALLEN, MARGARET VIDAURE and NGOC THI WIDDOWSON, Plaintiffs, vs. INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware corporation dba ITT CANNON Defendant.	No. CIV 94-0267 PHX RGS MOTION FOR LEAVE TO REQUEST TRIAL BY JURY

COMES NOW the Plaintiffs, by and through their undersigned attorney, and moves the Court for its Order granting leave to file a Demand for Trial by Jury in the above-entitled matter. This Motion is based upon Rule 38 of the Federal Rules of Civil Procedure and is supported by the Memorandum of Points and Authorities set forth hereinbelow:

MEMORANDUM OF POINTS AND AUTHORITIES

This action when it was initially filed was a part of a combined action with numerous other parties, which action was subsequently severed into three separate actions. Because of the Defendant's Motion to Sever and the resultant delay in filing an Answer until many months after the Complaint was filed, the Plaintiffs neglected to file a demand for a jury trial at that time. The failure to file a jury demand was an inadvertent one and the Plaintiffs desire to have the issues herein decided by a jury. It is submitted that the Defendant has not and will not suffer any prejudice as a result of this request.

Accordingly, Plaintiffs' request that the Court grant Plaintiffs leave to file a demand for a jury trial in the above matter.

RESPECTFULLY SUBMITTED this 21st day of November, 1994.

/s/ Jack Levine
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROGER DEMASSE, MARIA A. GARCIA, BILLY W. JONES, VOILA [sic] MUNGUIA, GREG PALMER, and SOCORRO SOZA, Plaintiffs, vs. INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware corporation d/b/a ITT CANON, Defendant.	No. CIV 94-1399 PHX ROS **ORDER** (Filed March 9, 1995)

On February 3, 1994, Plaintiffs Betty L. Allen, Margaret Vidaure, Ngoc Thi Widdowson, Roger Demasse, Maria A. Garcia, Billy W. Jones, Viola Munguia, Greg Palmer, Socorro Soza and Joseph W. Sullivan filed a Complaint with this Court alleging breach of contract. On February 23, 1994 Defendant International Telephone and Telegraph (ITT) filed a motion to sever the action into three lawsuits. ITT proposed that the first lawsuit include Plaintiffs Allen, Vidaure and Widdowson. The second lawsuit was proposed to include Plaintiffs Demasse, Munguia, Palmer, Soza, Jones and Garcia. Sullivan was to be the sole Plaintiff in the third lawsuit. This motion was

granted by a minute entry dated May 16, 1994. A written order was issued on July 14, 1994 confirming the minute entry. The instant case is the first lawsuit, which retained the original case number. The lawsuit involving the Demasse Plaintiffs was renumbered CIV 94-1399. The Answer in CIV 94-267 was filed on July 8, 1994. There is no date on the Answer filed in CIV 94-1399. On November 21, 1994, Plaintiffs filed a Motion for Leave to Request Trial by Jury in both cases. Plaintiffs cite inadvertence as the cause of their failure to file a jury demand.[1] For the reasons set forth below, the Court finds that the Plaintiffs are not entitled to a jury trial in either case.

THE LAW

Rule 38(b) of the Federal Rules of Civil Procedure provides that any party may demand a trial by jury of any issue "triable of right by a jury" by serving a written

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[1] To support his claim of inadvertence, counsel for the plaintiffs, Jack Levine, filed an affidavit in which he stated that he "had not practiced in the U. S. District Court for at least twenty years before [filing the complaint in this action]." The Court independently determined that Mr. Levine was counsel in approximately eight actions brought in Federal District Court for the District of Arizona in 1993 and 1994 and that in *Miller v. State Farm Ins. Co.*, CIV 94-0399 PHX PGR as plaintiffs' counsel he filed on February 18, 1994 a demand for a jury trial. In light of this discovery the Court was extremely troubled by Mr. Levine's seemingly clear and unequivocal denial of involvement or association with federal court cases for "twenty years." Mr. Levine's explanation at the hearing on this motion, though evincing recklessness, extremely poor judgment and incompetence did not appear to the court to be an intentional false statement made under oath.

demand upon the other party not later than ten days after service "of the last pleading directed to such issue." Rule 38(d) provides that failure to serve a demand as required by Rule 38(b) "constitutes waiver by the party of trial by jury." Clearly, Plaintiffs did not serve their demand within ten days of the date Defendant filed its Answer, the last pleading directed to the issues in this case.

Rule 39(b) of the Federal Rules of Civil Procedure provides in relevant part:

> [N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any and all issues.

Although a district court has discretion to order a jury trial upon a motion by a party that has not timely filed a demand for one, in the Ninth Circuit that discretion does not permit a district court to grant relief where the failure to timely file a demand is the result of "oversight" or "inadvertence." *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Lewis v. Time Inc.*, 710 F.2d 549, 557 (9th Cir. 1983).

Plaintiffs cite several cases from other circuits which hold that motions under Rule 39(b) should be granted unless they will result in prejudice, delay or waste of judicial resources. *See, Sullivan v. School board of Pinellas County*, 773 F.2d 1182 (8th Cir. 1985); *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Merritt v. Faulkener*, 697 F.2d 761 (7th Cir. 1983) *cert. denied* 464 U.S. 986 (1983); *Littlefield v. Fort Dodge Messinger*, 614 F.2d 581 (8th Cir.

1980) *cert. denied* 445 U.S. 945 (1980); *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964) *cert. denied* 379 U.S. 962 (1965); *Tavoulareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981); *Davis-Watkins Co. v. Service Merchandise Co.*, 500 F. Supp. 1244 (9th Cir. 1982) *aff'd* 686 F.2d 1190 (6th Cir. 1982). However, different circuits have different rules. "It is the rule in some courts that 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' Elsewhere, the judicial attitude is almost diametrically the opposite. Thus, it has been held that a court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default." Wright & Miller, Federal Practice & Procedure: Civil 2d § 2334 (1995) (citations omitted). Clearly, the circuits that the Plaintiffs cite fall closer to the former category and the Ninth Circuit falls closer to the latter category. Thus, the Plaintiffs' citations are neither controlling or persuasive.

THE FACTS

In their Motion for Leave to Request Trial by Jury, Plaintiffs state that they neglected to file a demand for jury trial because the Defendant's Motion to sever delayed the filing of the Answer until many months after the Complaint was filed. They characterize the failure to demand a jury trial as "inadvertent." Under Ninth Circuit law, this Court does not have discretion to grant a jury trial after the period specified under Rule 38(b) when the delay is due to inadvertence or inexcusable neglect. *Craig*, 19 F.3d at 477; *Blau*, 748 F.2d at 1357; *Lewis*, 710 F.2d at 557

In their reply, the Plaintiffs provide more details about their failure to demand a jury trial. They say that Plaintiffs' counsel's lack of familiarity with federal court "may" have led to the delayed realization that a demand should have been filed earlier. However, the Ninth Circuit has upheld the denial of trial by jury on the grounds that the attorney was not certified to practice in federal court and mistakenly thought that no demand was necessary under Rule 81(c). *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898 (9th Cir. 1982).

Plaintiffs also argue that the confusion created by the severance of the case into three separate cases contributed to the failure to file the demand. This is also no more than inadvertence, especially when the demand could have been made in the Complaint. In addition, Plaintiffs state that, when they stipulated to a delay in filing the answer, the answer was not attached to the stipulation as the stipulation required. It is unclear how this assists the Plaintiffs.

Plaintiffs also argue that the late request should be excused because it was caused by the fact that a new secretary filed the Answers without showing them to counsel, and, furthermore, filed them in the wrong place. Because the Court finds that counsel's secretary's errors constitute nothing more than "oversight" and "inadvertence," this argument is of no avail to the Plaintiffs.

Plaintiffs also argue that Plaintiffs' counsel may have lost track of the pleadings because of the severance of the cases and the resultant multiplicity of pleadings. However, the fact that the lawyer was swamped with work is

not an adequate excuse. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-88 (9th Cir. 1980).

The Plaintiffs do not claim that their Motion for Leave to Request a Jury Trial should be granted because the time between the deadline in Rule 38(b) and their Motion is short, but the Defendants note that the Ninth Circuit has held that the District Court did not abuse its discretion in refusing to allow untimely jury demands when the demand was late by two months, *Blau* 748 at 1357, or four months, *Beckham v. Safeco Ins Co.*, 691 F.2d 898 (9th Cir. 1982). In the instant case the demand is five months late.

Accordingly,

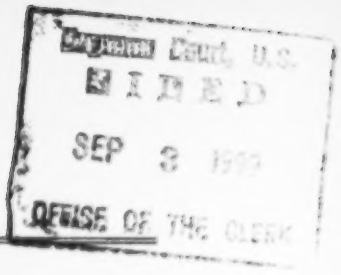
IT IS ORDERED denying Plaintiffs' Request for Jury Trial (Doc. 38).

DATED this 9 day of March, 1995.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States
District Judge

copies to all counsel of record

No. 99-235



In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

ROGER DEMASSE; MARIA A. GARCIA;
BILLY W. JONES; VIOLA MUNGUIA;
GREG PALMER; and SOCORRO SOZA,

Petitioners,

v.

ITT CORPORATION, a Delaware
corporation, dba ITT CANNON,

Respondent.

On Petition For A Writ of Certiorari to The
United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a trial court abuse its discretion under Rule 39(b), Fed. R. Civ. P., when it denies an untimely jury demand, when the party making that demand is represented by experienced counsel who fails to provide any credible explanation for the untimely demand, and when the demand appears to be an attempt to forum shop?

2. Should this Court cast aside more than a century of its own precedent governing inadvertent waivers of Seventh Amendment rights in favor of Petitioner's proposed rule of law, a rule that would eviscerate Rules 38 and 39, Fed. R. Civ. P.?

CORPORATE DISCLOSURE STATEMENT

Respondent ITT Corporation is a wholly owned subsidiary of ITT Industries, Inc., which is a publicly traded Indiana corporation.

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Edith G. Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966) 16

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Demasse v. ITT Corp., ___ P.2d ___, 296 Ariz. Adv. Rep. 3 (Ariz. 1999).

Demasse v. ITT Corp., 111 F.3d 730 (9th Cir. 1997).

Demasse v. ITT Corp., 915 F. Supp. 1040 (D. Ariz. 1995).

STATEMENT OF JURISDICTION

Petitioners seek review of an interlocutory decision from the Ninth Circuit Court of Appeals. While the Court possesses jurisdiction to review such interlocutory orders pursuant to 28 U.S.C. § 1254(1), the Court only exercises its jurisdiction over interlocutory orders when presented with a case of peculiar gravity and general importance. See Hamilton-Brown Show Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

STATEMENT OF THE CASE

Petitioners are a group of former employees of Respondent who were laid off between 1993 and 1994. Petitioners selected a federal forum, the United States District Court for the District of Arizona, in which to initiate their claim for breach of an implied employment contract under Arizona law.[1]

Petitioners failed to append to their Complaint a jury demand. Petitioners likewise failed to request a jury trial in any other manner when they filed the Complaint. When Petitioners filed the Complaint, they were required to prepare a "Civil Cover Sheet" that specifically required Petitioners to designate this action as a jury trial, if that is what they desired. Consistent with the Complaint,

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[1] The action was originally designated as Allen v. International Tel. & Tel. Corp., CIV 94-0267 PHX RGS.

Petitioners did not identify this action as a jury trial matter in their Civil Cover Sheet. At all times, Petitioners were represented by experienced legal counsel.

On February 23, 1994, Respondent moved to sever the matter into three separate actions. The District Court severed the matter on May 16, 1994. The action that is the subject of this Petition is designated Demasse v. ITT Corp., CIV 94-1399-PHX-RGS.[2]

On July 8, 1994, Respondent filed a separate Answer in each of the three severed cases. On the same day, Petitioners' counsel signed a stipulation acknowledging the three Answers and the timeliness of the Answers. Nonetheless, Petitioners again failed to request a jury trial.

On July 14, 1994, the Trial Court entered an Order further notifying Petitioners that Respondent filed its Answer in each of the severed cases. Petitioners still made no attempt to request a jury trial.

From August through November 1994, the parties engaged in an extensive exchange of information through discovery that included disclosure statements, supplemental

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[2] The Trial Court granted summary judgment against the Plaintiffs in the other two actions, and those cases are now final. See Allen v. International Tel. & Tel. Corp., 111 F.3d 137 (9th Cir. 1997); Sullivan v. International Tel. & Tel. Corp., CIV 94-1400-PHX-ROS. The action that is the subject of this Petition is all that remains of the original case.

disclosure statements, stipulated protective orders, lengthy depositions of all six Petitioners, numerous subpoenas, numerous interrogatories, and several document productions. At no time during this discovery period did Petitioners request a jury trial.

On October 14, 1994, Judge Roslyn O. Silver was invested as a United States District Court Judge for the District of Arizona. On November 9, 1994, this matter was reassigned from United States District Court Judge Roger G. Strand to Judge Silver. Upon learning of the reassignment to Judge Silver, Petitioners filed a Motion for Leave to Request Trial by Jury under Rule 38, Fed. R. Civ. P., on November 21, 1994. After briefing and oral argument on Petitioners' Rule 38 Motion, the Court denied the Motion by Order dated March 9, 1995.

On February 14, 1995, Respondent filed Motions for Summary Judgment on each of the Petitioners' claims, and Petitioners filed a consolidated Response and Cross-Motion for Summary Judgment on March 10, 1995. On May 23, 1995, the Trial Court granted each of Respondent's Motions for Summary Judgment, denied Petitioners' Cross-Motion, and entered formal judgment in favor of ITT. Petitioners filed a Motion to Alter or Amend the Judgment, which the District Court denied on March 4, 1996.

On March 8, 1996, Petitioners appealed the District Court's grant of Respondent's Motions for Summary Judgment, the denial of Petitioners' Cross-Motion, and the denial of Petitioners' Rule 38 Motion to the Ninth Circuit Court of Appeals. On April 17, 1997, the Ninth Circuit

issued an Order certifying two Arizona state law issues to the Arizona Supreme Court. In its Order, the Ninth Circuit issued a conditional ruling contingent upon the outcome of the certified questions. The Order provided that the Ninth Circuit would: (1) affirm the Trial Court and decline to reach the Rule 38 issue if either of the certified questions was answered in the affirmative, or (2) if both questions were answered in the negative, reverse the Trial Court, in part, and affirm the Trial Court's denial of Petitioners' Rule 38 Motion.

On May 25, 1999, the Arizona Supreme Court answered the certified questions in the negative. On June 9, 1999, the Ninth Circuit acknowledged the Arizona Supreme Court's ruling and affirmed, in part, and reversed, in part, the District Court's summary judgment orders, giving effect to the Ninth Circuit's previous Order affirming the denial of Petitioners' Rule 38 Motion.

REASONS FOR DENYING THE PETITION

Petitioners fail to articulate any compelling reason for this Court to grant their Petition. In contrast, Respondent can identify at least six reasons why the Court should deny the Petition.

First, Petitioners plainly seek interlocutory review of what is essentially a procedural order governing the conduct of an impending trial. While this Court may consider such interlocutory orders, Petitioners have failed to identify the special circumstances necessary to justify an interlocutory appeal.

Second, the unique factual record of this case renders it a poor vehicle through which to adopt the dramatic and sweeping changes to Seventh Amendment jurisprudence advocated by Petitioners. In the face of Petitioners' misrepresentations to the Trial Court in support of their claim of an "inadvertent" waiver of a jury trial, the Trial Court properly denied Petitioners' Rule 38 Motion regardless of the rule of law governing such waivers.

Third, the ten-day jury demand period in Federal Rule 38 does not unconstitutionally infringe on rights preserved by the Seventh Amendment. The Seventh Amendment preserves the right to a jury trial but does not mandate a jury trial. Thus, the right may be waived when a party fails to satisfy the rules that otherwise preserve the exercise of the right.

Fourth, the fact that Rule 38 may operate to create an "inadvertent" or "unintentional" waiver of Seventh Amendment rights does not render the Rule constitutionally suspect. The Federal Rules of Civil Procedure provide for countless opportunities to inadvertently waive Seventh Amendment and/or other constitutional rights outside of the Rule 38 context. Petitioners' rationale, taken to its logical extreme, would eviscerate such basic, cornerstone procedural vehicles as summary judgment, default judgment and a host of other procedures that protect the orderly administration of justice.

Fifth, while the Circuit Courts of Appeals do not follow the identical analytical approach to waivers of jury trial rights, Petitioners' assertion that the Circuits are "hopelessly divided" misrepresents the law. In fact, the

Circuits are all quite similar in their approach to such waivers, and no clarification of this rule of law is necessary from the Court at this time.

Sixth, Petitioners advocate an interpretation of Federal Rule 39(b) that would effectively eviscerate Rule 38. Petitioners fail to give any weight to the effective administration of justice, a substantial public interest embodied in Rule 38. Nothing in the Seventh Amendment or in Rules 38 and 39 requires a trial court to honor an untimely jury demand based solely on absence of prejudice to the non-moving party.

I

PETITIONERS HAVE FAILED TO ARTICULATE ANY COMPELLING REASON FOR THIS COURT TO HEAR AN INTERLOCUTORY APPEAL ON A PROCEDURAL ISSUE.

Because the Ninth Circuit has remanded this matter to the Trial Court for further proceedings, including a possible trial, Petitioners seek an interlocutory appeal. While this Court may exercise jurisdiction over this interlocutory appeal, the Court rarely does so absent compelling circumstances. See Hamilton-Brown Show Co. v. Wolf Bros. & Co., 240 U.S. 241, 258 (1916).

This matter does not present the Court with legal questions so pressing that they cannot be resolved through the ordinary course of appellate review. To the contrary, as explained in the following sections of this Opposition Brief, the issues presented in this matter have effectively

been decided by this Court, and the unique record in this matter does not support a departure from settled precedent.

II

THE UNIQUE FACTUAL RECORD IN THIS MATTER CANNOT SUPPORT THE SWEEPING CHANGES IN SEVENTH AMENDMENT JURISPRUDENCE THE PETITIONERS SEEK.

This is not a case in which a *pro se* plaintiff inadvertently failed to timely demand a jury trial, and a district court unjustly exercised its discretion under Rule 39 to deny an untimely request. To the contrary, Petitioners were represented at all times by experienced counsel.

This is also not a case in which a plaintiff was involuntarily drawn into a federal court through the removal process, which might provide some explanation for a failure to file a timely jury demand. Petitioners elected to file their singularly state law claims in the federal forum, and thereby chose the rules of procedure that would govern this action. Petitioners nonetheless failed to request a jury trial within the time limits prescribed by Rule 38.

This is, however, a case in which the record does not support Petitioners' assertion of "inadvertent" waiver. Every supposed excuse offered by Petitioners for their failure to file a timely jury trial demand was demonstrably false. Viewing this fact in conjunction with the fact that Petitioners first requested a jury trial immediately after this case was reassigned from Judge Strand to Judge Silver, regardless of how this Court might interpret Rule 39, the

Trial Court and Ninth Circuit properly concluded that Petitioners irretrievably waived their right to a jury trial.

In their Rule 38 Motion, Petitioners asserted that they failed to request a jury trial in a timely fashion because their counsel had not appeared in a federal court in more than twenty years and was therefore unfamiliar with federal court practice. Petitioners even presented the Trial Court with an affidavit from Petitioners' counsel to that effect. After reviewing its own docket, the Trial Court found this assertion to be false: not only had Petitioners' counsel appeared as counsel of record in federal court several times in 1993 and 1994 alone, but Petitioners' counsel had perfected a timely jury demand in a separate federal court action within two weeks of filing the Complaint in this matter.[3]

In their Rule 38 Motion, Petitioners also asserted that, due to an alleged office clerical error, they failed to request a jury trial in a timely fashion because they were not aware that the Answer had been filed. However, on the very day that Respondent filed its Answer, Petitioners' counsel personally executed a stipulation in which he unequivocally acknowledged that Respondent had filed a timely Answer. Less than one week later, Petitioners received on Order from the Trial Court further notifying Petitioners that Respondent had filed a timely Answer. Even assuming Petitioners never received a copy of the Answer, Petitioners were plainly aware that an Answer was

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[3] The Trial Court described the affidavit of Petitioners' counsel as "evincing recklessness, extremely poor judgment and incompetence."

on file many months before they filed their untimely jury trial demand.

Assuming, for the sake of argument, that the Circuits are "hopelessly divided" on purported inadvertent waivers under Rules 38 and 39, no interpretation of these rules would revive Petitioners' untimely jury demand. Nothing in the record supports Petitioners' assertion of inadvertence. Everything in the record suggests that Petitioners' counsel knew how to perfect a jury trial demand under Rule 38, and knew that Respondent filed a timely Answer, yet Petitioners elected to demand a jury trial only after learning that Petitioners would no longer be trying the case to Judge Strand. Not one of the cases cited by Petitioners suggests that a trial court abuses its discretion by denying an untimely jury demand under such circumstances. Likewise, nothing in the Seventh Amendment, or the Constitution as a whole, affords litigants a constitutional right to shop for a particular trier of fact. To hold otherwise would open the door to countless untimely jury demands premised upon unsubstantiated or, as in this case, demonstrably false assertions of inadvertence of counsel.

Because the Trial Court would have abused its discretion by granting Rule 39(b) relief in the face of Petitioners' false assertions of inadvertent waiver, there is simply no reason to reach the supposed constitutional questions advanced by Petitioners' writ. See Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) ("[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought

not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

III

RULES 38 AND 39 PROPERLY EFFECTUATE THE ORDERLY ADMINISTRATION OF JUSTICE WITHOUT INFRINGING ON SEVENTH AMENDMENT RIGHTS, AND THE CIRCUIT COURTS ARE IN GENERAL AGREEMENT ON HOW TO IMPLEMENT THESE RULES.

Assuming, for the sake of argument, that Petitioners' waiver of their Seventh Amendment rights was inadvertent, the Trial Court still did not abuse its discretion under Rule 39, nor did it unconstitutionally deprive Petitioners of their Seventh Amendment rights. Nothing unique to the Seventh Amendment requires a "knowing and voluntary" waiver of the rights preserved by the Amendment. As set forth below, rights preserved by the Seventh Amendment are subject to inadvertent waiver through a variety of procedural vehicles that all pass constitutional muster. The Circuit Courts are in essential agreement on this point, and there is, therefore, no reason to overturn a century of Seventh Amendment jurisprudence from this Court and others in favor of the unworkable rule of law that Petitioners advocate.

A. The Waiver Provision Of Rule 38 Is Constitutional.

The Seventh Amendment, which became part of the United States Constitution in 1791, preserves the right to a jury trial in civil suits. U.S. CONST. amend. VII. Rule 38

expressly recognizes and preserves this right. Fed. R. Civ. P. 38(a). Although this Court has not directly addressed the constitutionality of the jury trial waiver provision of Rule 38, it has previously affirmed the implied waiver of Seventh Amendment rights under Rule 38:

> Respondents also contend that the trial of this proceeding as an action for equitable relief denied their constitutional right to a jury trial. No demand for a jury trial was made as required by Federal Rule of Civil Procedure 38 and, so far as this record shows, any right to a jury trial was waived.

United States v. Moore, 340 U.S. 616, 621 (1951).

The principle of implied waiver of Seventh Amendment rights embodied by Rule 38(d) was deeply entrenched in American jurisprudence long before Rule 38 was adopted. See, e.g., Kearney v. Case, 79 U.S. 275, 281 (1870) (noting implied waiver of jury trial rights in numerous decisions predating adoption of the Seventh Amendment and holding that the right to a jury trial may be waived without written stipulation); Fed. R. Civ. P. 38, 1937 Advisory Committee Notes (Rules 38 and 39 "make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions"). This firmly established principle is based on the notion that the Amendment preserves the *right* to trial by jury but does not make trial by jury imperative:

> Had the terms been that 'the trial by jury shall be preserved,' it might have been contended that they were imperative, and could not be dispensed with. But the words are that the *right* of trial by jury shall be preserved . . . and the benefit of it may therefore be relinquished.

Bank of Columbia v. Okely, 17 U.S. 235, 244 (1819) (emphasis added). See also Kearney, 79 U.S. at 281; Capital Traction Co. v. HOF, 174 U.S. 1, 22-23 (1899).

This Court has repeatedly held that the Seventh Amendment preserves the substance of the common law right to trial by jury, but not mere matters of form or procedure incident to the right at common law. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336-37 (1979); Colgrove v. Battin, 413 U.S. 149 (1973); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). This Court has upheld a variety of rules and statutes that prescribe reasonable form or procedural prerequisites to the right of trial by jury in the face of Seventh Amendment challenges. See Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315 (1902) (court rule authorizing default judgment in the absence of sufficient defense affidavit prescribes the procedure by which the right to trial by jury accrues and does not violate Seventh Amendment rights); Capital Traction Co., 174 U.S. 1 (statute expanding jurisdiction of justice court and delaying trial by jury until appeal from justice court does not violate Seventh Amendment rights). As the Court concluded in Capital Traction Co., the Seventh Amendment preserves the *right* to trial by jury and "does not prescribe . . . what conditions

may be imposed upon the demand of such trial, consistently with preserving the right to it." Id. at 23. Thus, conditioning the right to a jury trial on an affirmative demand as set forth in Rule 38, one of the many procedural rules governing the orderly prosecution of cases in court, unquestionably preserves the right protected by the Seventh Amendment.

While Petitioners assert that the Seventh Amendment does not permit anything short of a "knowing and voluntary" waiver of a jury trial, and only then upon a showing of "clear and compelling evidence," numerous procedural encroachments on the historic domain of the civil jury have survived constitutional challenge before this Court. See, e.g., Parklane Hosiery, 439 U.S. 322 (offensive use of collateral estoppel does not violate Seventh Amendment right); Colgrove, 413 U.S. 149 (local rule governing number of jurors did not infringe on Seventh Amendment right); Galloway v. United States, 319 U.S. 372 (1943) (directed verdict does not violate Seventh Amendment right); Baltimore & Carolina Line, 295 U.S. 654 (judgment of dismissal on the merits without new trial after jury verdict for plaintiff did not violate Seventh Amendment rights); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931) (court may set aside jury verdict for damages without violating Seventh Amendment right); Fidelity & Deposit Co., 187 U.S. 315 (default judgment does not violate Seventh Amendment right); Bank of Columbia, 17 U.S. 235 (bank's summary attachment process did not violate Seventh Amendment rights). These decisions delimit the parameters of Seventh Amendment rights, and make clear that procedural requirements incident to the right, like the demand period

and waiver provision set forth in Rule 38, are constitutional.

B. A Party May Constitutionally Waive Seventh Amendment Rights Absent "Clear and Compelling" Evidence Of "Knowing And Voluntary" Waiver.

The jury trial waiver provision of Rule 38 is not unique. Judicial proceedings are replete with opportunities for unintentional waivers of substantial rights, including constitutional rights, based on the inaction of the parties or their counsel, among other things. See, e.g., Yakus v. United States, 321 U.S. 414 (1944). This Court has held:

> [n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Id. at 444 (citing cases).

Petitioners' blanket statement that waivers of constitutional rights may only be enforced by clear and compelling evidence of an intentional waiver, while accurate in certain limited circumstances, ignores the numerous situations in litigation in which parties forfeit constitutional rights, including rights to liberty, property, and access to the courts under the Fifth and Fourteenth Amendments, based on lack of affirmative action by the

parties or their counsel. See, e.g., Baker v. Gold Seal Liquors, Inc., 417 U.S. 467 (1974) (compulsory counterclaim lost due to failure to timely plead); Industrial Addition Ass'n v. Commissioner of Internal Revenue, 323 U.S. 310 (1945) (improper venue defense waived based on failure to timely assert defense); Fidelity & Deposit Co., 187 U.S. 315 (default judgment in the absence of sufficient defense affidavit); Fed. R. Civ. P. 12(h) (certain defenses waived when omitted from motion or pleading); Fed. R. Civ. P. 13(a) (compulsory counterclaims shall be raised at specific times or forfeited); Fed. R. Civ. P. 41(b) (involuntary dismissal for lack of prosecution); Fed. R. Civ. P. 55(a) (default judgment); Fed. R. Civ. P. 56 (e) (summary judgment when adverse party does not properly respond to motion and affidavits). Indeed, these and many other procedural rules effectively deprive parties of Seventh Amendment rights on a regular basis, with mere inadvertence as the only basis for the deprivation of Seventh Amendment rights. Rules 38 and 39 are in no way unique in this respect, nor do they require the special waiver rules proposed by Petitioners.

Carried to its logical conclusion, Petitioners' assertion that all waivers of all constitutional rights must be knowing and voluntary contradicts the very notions of statutes of limitations and rules of procedure on which the orderly administration of court proceedings is based. Litigants and/or eligible claimants inadvertently forfeit constitutional rights to liberty, property, and access to the courts each day, by negligently allowing limitations periods to lapse, and by failing to properly comply with procedural rules. See, e.g., Delaware State College v. Ricks, 449 U.S. 250 (1980) (dismissal of Title VII discrimination action for

failure to comply with limitations period); Chardon v. Fernandez, 454 U.S. 6 (1981) (dismissal of untimely Section 1983 action); Baker, 417 U.S. 467 (compulsory counterclaim lost due to failure to comply with Rule 13); Industrial Addition Ass'n, 323 U.S. 310 (improper venue defense waived based on failure to comply with Rule 12); Fidelity & Deposit Co., 187 U.S. 315 (default judgment). These cases establish that, in the face of constitutional challenge, this Court has upheld various mechanisms that can result in forfeiture of constitutional rights through inaction, delay or inadvertence. Such mechanisms are generally intended to facilitate the orderly administration of cases through the judicial system. The waiver provision of Rule 38 and the judicial discretion provision in Rule 39 are no different.

The Seventh Amendment does not guarantee a jury trial right in every instance. See, e.g., Katchen v. Landy, 382 U.S. 323 (1966) (Bankruptcy Act converted legal claims to equitable claims that were not governed by Seventh Amendment). It simply preserves the limited jury trial rights that existed as of its adoption in 1791. See generally Edith G. Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). Petitioners cannot justify their proposed heightened scrutiny of jury trial waivers when the Seventh Amendment, itself, establishes less emphatic preservation of these "rights," and while other constitutional provisions, which emphatically preserve constitutional rights without exception, may be subject to inadvertent waiver. Cf. Bank of Columbia, 17 U.S. at 244.

The majority of Petitioners' argument is premised upon the false assumption that constitutional rights cannot be waived inadvertently. Petitioners do not, and cannot, explain why the limited set of rights preserved by the Seventh Amendment should be subject to greater judicial protection than other constitutional rights that are subject to inadvertent waiver.

C. The Circuit Courts Agree That It Is Not An Abuse Of Discretion To Deny An Untimely Jury Demand When Untimeliness Is Due To Inadvertence Of Counsel.

To be sure, decisions of the Circuit Courts of Appeals reflect slight variations in the way in which the discretion element of Rule 39 is applied. However, all of these Courts implicitly recognize a consistent unifying theme in their holdings: it is not an abuse of discretion to deny an untimely jury demand when the untimeliness is due to mere inadvertence of counsel. Petitioners' assertion that the "First, Fifth, Seventh, and Tenth Circuits interpret Rule 39(b) to require the exercise of discretion in favor of a trial by jury" unless "significant prejudice to other parties or to the Court is shown" misrepresents the law in those Circuits. [See Petition at 6-7.]

The First Circuit case cited by Petitioners actually held only that it was not an abuse of discretion to grant a Rule 39(b) motion based on inadvertence when the moving party was a *pro se* plaintiff. Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987). The Rowlett plaintiff was later represented by counsel, and the First

Circuit held: "we certainly agree that conscientious counsel should have checked to make sure [plaintiff] had requested a jury," but the court declined to hold that the district court abused its discretion by granting the jury request. Id. The First Circuit cited not only lack of prejudice to the opposing party, but also the fact that the plaintiff's "initial status as a *pro se* plaintiff justifie[d] the district court's decision to grant him some indulgence on the waiver of a jury trial." Id. The court's holding was limited to a plaintiff acting without assistance of counsel, and it is not applicable to the alleged inadvertent waiver by counsel at issue in this case.

In support of their claim that the Fifth Circuit requires a jury trial under Rule 39(b) unless significant prejudice is shown, Petitioners rely on another case involving a *pro se* litigant. See Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985). In Lewis, the Fifth Circuit specifically addressed the precise waiver issue before the Trial Court and the Ninth Circuit in this case, holding:

> it is *not* an abuse of discretion . . . to deny a Rule 39(b) motion when the failure to make a timely demand for a jury trial results from mere inadvertence . . . . [A] trial court does *not* abuse its discretion in denying a Rule 39(b) motion when the failure to file a timely demand under Rule 38 results from mere inadvertence on the part of the moving party's counsel.

Lewis, 767 F.2d at 257-58 (emphasis added; citations omitted). See also United States v. Lochamy, 724 F.2d

494, 499 (5th Cir. 1984) (delay is considered strongly against a Rule 39 motion when no justification is offered for the delay). The Fifth Circuit appears to fall squarely in line with the Ninth Circuit on this issue.

Petitioners rely on a case involving a blind *pro se* litigant, and a case citing the blind *pro se* litigant case in *dicta*, to support their assertion that the Seventh Circuit requires Rule 39(b) requests to be granted unless prejudice is shown. See Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983); Kotsilieris v. Chalmers, 966 F.2d 1181 (7th Cir. 1992). Significant limiting language in these opinions belies Petitioners' assertion. As the Merritt court concluded:

> this is not a case of mere inadvertence of counsel. This motion was made by a blind *pro se* litigant who indicated from his first pleadings . . . that he did not feel competent to represent himself in court.

Merritt, 697 F.2d at 767. In fact, the Seventh Circuit has since explained that the Merritt court's implication that prejudice is required before a Rule 39(b) jury request may be denied "has not been used as the standard in any later opinion in this [C]ircuit." See Members v. Paige, 140 F.3d 699, 703 (7th Cir. 1998). The Members court correctly held that if prejudice was the "legal standard, this language would strip district judges of the discretion Rule 39(b) confers and nullify the waiver consequence specified in Rule 38(d)." Id.

Petitioners also rely on *dicta* in a dated Tenth Circuit case to support their claim that prejudice is required before a Rule 39 motion for jury trial may be denied. [Petition at 6.] A more recent Tenth Circuit opinion relied on established Tenth Circuit precedent to articulate the Circuit's current position on Rule 39(b) motions:

> [w]e have previously held that the district court does not abuse its discretion by denying a Rule 39(b) motion when the failure to make a timely jury demand results from nothing more than mere inadvertence of the moving party.

Dill v. City of Edmond, Okla., 155 F.3d 1193, 1208 (10th Cir. 1998) (citing Nissan Motor Corp. v. Burciaga, 982 F.2d 408, 409 (10th Cir. 1992)).

Finally, while Petitioners point favorably to the Eleventh Circuit as the "middle road" approach that would best effectuate the purposes of Rules 38 and 39 while providing appropriate deference to Seventh Amendment rights, their reliance is misplaced. The Eleventh Circuit also recognizes that mere inadvertence of counsel does not mandate relief under Rule 39(b):

> [a]lthough the normal practice in the district court is to balance all of the factors enumerated above, when reviewing a lower court's denial of a belated jury request our cases require that appellate courts give considerable weight to the movant's excuse for failing to make a timely jury request. If

> that failure is due to *mere inadvertence* on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion.

Parrot v. Wilson, 707 F.2d 1262, 1267 (11th Cir. 1983) (emphasis added).

In short, the Circuit Courts unanimously recognize that mere inadvertence of counsel, without more, does not entitle a party to Rule 39(b) relief, and that a trial court does not abuse its discretion when it denies an untimely jury demand in the face of mere inadvertence of counsel.[4] In the face of this unanimity, there is no reason for this Court to grant the Petition.

D. Petitioners' Proposed Construction Of Rule 39(b) Would Render Rule 38 Meaningless.

Petitioners' argument that this Court should adopt a reasonable construction of Rule 39(b), like the interpretation "prevailing in the First, Fifth, Seventh, and Tenth Circuits," is based on Petitioners' misstatement of the governing law in those courts. [See supra part III.C.] Nevertheless, an interpretation of Rule 39(b) that would require a showing of prejudice before a court could exercise

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[4] Contrary to Petitioners' argument, the cases cited by Petitioners from the Second, Fourth, and Ninth Circuit Courts do not require "compelling circumstances" before Rule 39(b) motions will be granted. These cases simply hold that denial of a Rule 39(b) motion does not constitute abuse of discretion when the untimely filing is due to mere inadvertence. [See Petition at 6-7.]

its discretion to deny an untimely jury request would render Rule 38 meaningless. See Members, 140 F.3d at 703.

The Federal Rules of Civil Procedure are a legislative enactment, and traditional tools of statutory construction apply to determine their meaning. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). The Rules should be given their plain meaning, and when the terms are unambiguous, judicial inquiry is complete. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989). This Court construes legislative enactments in a manner that avoids rendering any parts superfluous or meaningless whenever possible. Astoria Fed. Savs. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

The provisions of Rule 38(b) and (d) are unambiguous and must be given their plain meaning. They direct that a party must serve a written demand for a jury "at any time after the commencement of the action and not later than 10 days after the service of the last pleading," and that "[t]he failure of a party to serve a demand as required by this Rule constitutes a waiver." Fed. R. Civ. P. 38(b) & (d). This language is clear and leaves no room for interpretation. See Pavelic & LeFlore, 493 U.S. at 123.

Similarly, Rule 39(b) unambiguously vests a court with substantial discretion to grant relief from waiver: "the court, in its discretion upon motion, may order a trial by a jury of any or all issues." Fed. R. Civ. P. 39(b). This Court has held that grants of discretion in the Federal Rules of Civil Procedure imply deferential appellate review. See

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 399-405 (1990).

If Rule 39(b) were interpreted to require a court to grant a jury demand unless prejudice to the other party is established, it would render the demand provision of Rule 38(b) superfluous, and the waiver provision of Rule 38(d) meaningless, because the timing of a demand would not be consequential, except in the rare instances when prejudice to the opposing party can be established. This Court avoids constructions that render language meaningless or superfluous whenever possible. See Astoria Fed. Savs. & Loan Ass'n, 501 U.S. at 112.

While Petitioners sponsor the Eleventh Circuit's analytical approach to Rule 39(b) articulated in the Parrot case [Petition at 10-11], as explained above, this approach would not rescue Petitioners' untimely jury demand, because the Eleventh Circuit holds that inadvertence of counsel does not compel relief under Rule 39(b). Parrot, 707 F.2d at 1267. Nothing in Rules 38 and 39, nor any Circuit Court authorities, requires a trial court to grant Rule 39(b) relief absent a showing of prejudice. To hold otherwise would countenance and encourage haphazard legal representation and, as appears to have occurred in this case, unadulterated judge shopping.

CONCLUSION

The decisions of the Circuit Courts that have addressed the precise issue that was before the Ninth Circuit in this case have uniformly reached the same conclusion: it is not an abuse of discretion to deny an untimely jury demand when the untimeliness was due to inadvertence of counsel. That uniform conclusion effectuates the purposes of Rules 38 and 39, ensures the efficient administration of justice, and effectively preserves those rights recognized by the Seventh Amendment. There is no need for this Court to weigh in on what is otherwise an issue devoid of controversy among the Circuit Courts. This is particularly true in light of the interlocutory nature of the Petition and the unique record below.

For these reasons, Respondent respectfully requests the Court to deny the Petition.

DATED September 2, 1999.

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APPENDIX A

OPINIONS AND ORDERS ENTERED IN CONJUNCTION WITH THE JUDGMENT TO BE REVIEWED

June 9, 1999 Ninth Circuit Order
(finalizing Order affirming denial of jury request) A-2

April 17, 1997 Ninth Circuit Order
(affirming denial of jury request) A-4

March 9, 1995 District Court Order
(denying untimely Motion for jury trial) A-26

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; SOCORRO SOZA,	)	No. 96-15520
	)	D.C. No. CV-94-01399-ROS
Plaintiffs - Appellants,	)	
v.	)	**ORDER**
ITT CORPORATION, a Delaware Corporation dba ITT CANNON,	)	(Filed June 9, 1999 Cathy A. Catterson, Clerk, U.S. Court of Appeals)
Defendant - Appellee.	)	

Appeal from the United States District Court
For the District of Arizona
Roslyn O. Silver, District Judge, Presiding
Argued March 10, 1997
Submitted June 4, 1999
San Francisco, California

Before: WHITE, Associate Justice, Retired;* CANBY and RYMER, Circuit Judges.

*The Honorable Byron R. White, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

This case is submitted as of June 4, 1999.

By order of April 17, 1997 we certified two questions to the Arizona Supreme Court. The Arizona Supreme Court filed an opinion May 25, 1999 answering the two certified questions in the negative. Therefore, we reverse the judgment of the district court and remand for further proceedings not inconsistent with the Arizona Supreme Court's opinion; we deny ITT's request for attorneys' fees incurred on appeal; and we affirm the district court's denial of the employees' untimely demand for a jury trial.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; SOCORRO SOZA, *Plaintiffs - Appellants,*	)	No. 96-15520
v.	)	D.C. No. CV-94-01399-ROS
ITT CORPORATION, a Delaware Corporation dba ITT CANNON, *Defendant - Appellee.*	)	ORDER

Filed April 17, 1997

Before: Byron R. White, Associate Justice, Retired;*
William C. Canby, Jr. and Pamela Ann Rymer,
Circuit Judges.

COUNSEL

Jack Levine, Phoenix, Arizona, for the plaintiffs-appellants.

John Alan Doran, Bryan Cave, Phoenix, Arizona, for the defendant-appellee.

*The Honorable Byron R. White, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

ORDER

RYMER, Circuit Judge:

Former employees of ITT Corporation appeal from summary judgment on their claim that ITT breached an implied-in-fact promise to conduct layoffs according to the seniority provisions of superseded employee handbooks, rather than the "merits" policy contained in a new handbook issued shortly before they were laid off. The district court assumed that the old handbooks were part of the employees' contracts because they did not clearly disclaim contractual intent, but held in a published opinion that the seniority provisions of those handbooks could be changed by ITT and thus no longer applied. *Demasse v. ITT Corp.*, 915 F. Supp. 1040 (D. Ariz. 1995). The court also concluded in the alternative that summary judgment was appropriate because the employees were bound by the handbooks' grievance procedures, which the employees failed to exhaust.

The employees argue that while ITT was free to change its handbooks at any time, it could not change their employment contract; ITT maintains that the employees were employed at will notwithstanding the layoff provisions in the old employee manuals, and that it was entitled as a matter of law to revise its handbooks as well as its layoff policies. The employees further contend that exhaustion should only be required when grievance procedures are a condition for receiving the benefits which

their contract of employment otherwise confers; ITT submits that employees cannot rely on handbooks to imply

a seniority provision but refuse to follow the grievance procedure that the same handbooks prescribe.

There appears to be no controlling precedent under Arizona law, which we must apply in this diversity action, on the right of an employer unilaterally to revise handbook policies that have become part of the employment contract. Nor does there appear to be controlling Arizona law on the duty of an employee to exhaust internal grievance procedures before seeking relief for breach of an implied-in-fact contract arising from a handbook that also contains a complaint procedure. Because an answer to both questions may be determinative of this appeal, we certify each to the Arizona Supreme Court.

I

Roger Demasse, Maria A. Garcia, Billy W. Jones, Viola Munguia, Greg Palmer, and Socorro Soza were hired by ITT at various times between 1960 and 1979 as hourly workers.[1] In 1990, ITT began laying off employees at its Phoenix facility, reducing the number of hourly production workers from 132 to 68 by the end of 1992, to 49 by the end of 1993, and to 36 by the end of 1994. Demasse, Soza, and Palmer were laid off on April 29, 1993; Munguia, on May 4, 1993; and Jones and Garcia, on January 10, 1994.

ITT published five handbooks over the years. Those issued before 1989 provide that layoffs within each job classification will be made in reverse order of seniority. Except for the first handbook, which was issued before 1971 and which did not give employees "bumping" rights

[1] Because their claims are the same for purposes of this appeal, we shall refer to these employees collectively as "Demasse."

outside of their own classification or department, the pre-1989 manuals also permit employees to use their seniority rights to "bump" less senior employees in other job classifications within the same job family (so long as they can do the work without training), and in different job families (so long as they once worked in that classification and are just as skilled as the bumped worker). ITT concedes that the pre-1989 seniority policy was enforceable while it lasted.

In 1989, a new handbook came out. Its layoff provisions are virtually identical to those in the 1973 handbook it replaced, but the 1989 version has a disclaimer on the first page which states:

> Within the limits allowed by the law, ITT Cannon reserves the right to amend, modify, or cancel this handbook, as well as any or all of the various policies, rules, procedures, and programs outlined within it. Any amendment or modification will be communicated to affected employees, and while the handbook provisions are in effect, will be consistently applied.

The 1989 handbook also states:

> In all cases, the specific provisions of policies, rules, procedures, and programs supersedes the contents of this handbook and nothing contained herein shall be construed as a guarantee of continued employment. . . . ITT Cannon does not guarantee continued employment to

> employees and retains the right to terminate or layoff employees.

The Demasse employees signed a receipt for the 1989 handbook acknowledging that they had received the handbook. Each read it and understood that ITT had the right to change or cancel its provisions.

On March 18, 1993, ITT gave notice of a revised layoff policy for hourly workers that would supersede the handbook and become effective April 19. From then on, layoff decisions for hourly workers would be based on criteria previously used only for salaried layoffs, primarily "abilities and documentation of performance," rather than seniority. The Demasse employees were advised of the policy, and were let go ahead of less senior employees pursuant to it.

Both the 1989 and the pre-1989 handbooks incorporate a complaint procedure. Under the 1989 handbook, an employee who feels that a "policy, rule, or procedure in this handbook has not been fairly administered" is first to talk to his supervisor, next to a higher level of management, then to the personnel department, and if still unsatisfied, may submit a formal complaint for resolution by a complaint committee or the Division General Manaer.

Without following the grievance procedure, Demasse filed suit in federal district court for breach of the implied-in-fact contract provision requiring that layoffs be carried out according to seniority. ITT moved for summary judgment, which the Demasse employees opposed with affidavits stating that they had turned down other job opportunities because they didn't wish to lose the benefits

of the seniority provisions in the handbook. The district court, following *Leikvold v. Valley View Community Hospital,* 141 Ariz. 544, 688 P.2d 170 (1984), denied summary judgment on the existence of an implied-in-fact contract because none of the handbooks (including the 1989 version) conspicuously stated that the manual is not part of the employment contract. However, relying on *Chambers v. Valley National Bank,* 721 F. Supp. 1128 (D. Ariz. 1988), the court concluded that the terms of an employment contract created by one handbook can be superseded by a subsequent handbook. Thus, in its view, the 1989 handbook (which the Demasse employees knew about and continued to work at ITT after reading) allowed ITT to make any amendments to the handbook that it wanted to make so long as it told the employees about the change. Since the 1993 revised layoff policy states that it supersedes prior handbooks, the district court concluded that ITT fulfilled its contractual commitment to let the affected employees know about the change in policy. Therefore, the district court held, even assuming that the handbooks created an implied-in-fact contract, ITT did not breach it. The court also relied on federal courts' interpretation of Arizona law to grant summary judgment for ITT on the ground that Demasse failed to comply with the grievance procedures described in the employee handbooks. *See Moses v. Phelps Dodge Corp.,* 818 F. Supp. 1287 (D. Ariz. 1993) (handbook stated that grievance procedures were exclusive procedure for processing disputes for termination from employment); *Thomas v. Garrett Corp.,* 744 F. Supp. 199 (D. Ariz. 1989) (handbook provisions applied to layoff), *aff d,* 904 F.2d 41 (9th Cir.), *cert. denied,* 498 U.S. 982 (1990). After unsuccessfully moving to alter or amend the judgment, Demasse timely appealed.

II

The Arizona Supreme Court has instructed that "[i]n order to establish a breach of contract claim based upon a violation of personnel rules a plaintiff must prove two things: the personnel manual actually became part of the employment contract and the terms of the manual were breached." *Wagner v. City of Globe,* 150 Ariz. 82, 86, 722 P.2d 250, 254 (1986) (en banc).[2]

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[2] As the Court explained:

> Every employment contract for an indefinate term is presumed to be terminable at will. . .
>
> The at-will employment relationship, despite its limitations, is nonetheless contractual. Employment contracts, particularly those which would be considered at will, are the best and most typical examples of unilateral contracts. Unlike a bilateral contract, a unilateral contract does not require mutuality of obligation; but there is sufficient consideration in the form of services rendered . . . . Because the at-will employment relationship is contractual, it can be modified by the parties at any time just as other contracts can be modified. Accordingly, the presumption that employment contracts of indefinate duration are terminable at will can be modified by the parties.
>
> One widely accepted means of modifying the at-will contract is use or publication of personnel manuals, guides, or rules by employers. An employer's representations contained in a personnel manual "can become terms of the employment contract and limit an employer's ability to discharge his or her employees," *Leikvold v. Valley View Community Hospital*, 141 Ariz. at 546, 688 P.2d at 172, even though the personnel policies are not bargained for at the time of hiring. . . .
>
> Whether the parties intended to modify their at-will contract, by use of a personnel manual or otherwise, is a question of fact. Evidence relevant to this decision includes the language

A

Relying on *Leikvold* and *Wagenseller v. Scottsdale Memorial Hospital,* 147 Ariz. 370, 710 P.2d 1025 (1985), Demasse argues that Arizona law treats handbook provisions upon which employees rely as implied-in-fact contract terms that limit the employer's right to discharge an at-will employee. While Demasse's argument overstates what *Leikvold* holds because its "handbook" exception does not turn entirely on reliance, *see Wagner,* 150 Ariz. at 85, 722 P.2d at 254, we nevertheless agree with the district court that *Leikvold* controls whether the seniority provisions of the old handbooks became part of the employment contract.

In *Leikvold,* the employee argued that the dismissal policy in a manual she was given constrained the hospital's right to discharge her except in conformance with the manual's procedures; the hospital contended that the manual was nothing more than a unilateral expression of policy. The Supreme Court held that handbook provisions can become part of employment contracts, and that whether any particular handbook modifies any particular at-will relationship depends on the language used in the manual as well as the employer's course of conduct and oral representations. As the Court explained:

> Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that

---

of the personnel manual, any representations made by the employer, and the course of dealing between the employer and the employee. Reliance is not an essential predicate to the action, but is only one of the several relevant factors.

> the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Such actions, either not issuing a personnel manual or issuing one with clear language of limitation, instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual. However, if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

141 Ariz. at 546, 688 P.2d at 174.

ITT argues that under the Arizona Court of Appeals's decision in *Duncan v. St. Joseph's Hospital and Medical Center,* 183 Ariz. 349, 903 P.2d 1107 (1995) rendered after the district court's decision in this case, and the federal district court's opinion in *Thomas,* its manuals cannot be construed as an implied contract because in the 1989 revision it specifically disclaimed contractual intent and reserved the right unilaterally to alter any policy contained in that handbook.

In *Duncan,* the Court of Appeals of Arizona considered whether an employee's at-will status was altered by the employer's handbook provisions. The hospital's handbook stated that neither the handbook nor the rules and policies in it constitutes an employment contract, that employment at St. Joseph's is "at will," and that the employment relationship may be terminated at any time with or without

cause. The court held that, as a matter of law, the handbook was not part of Duncan's employment contract because it did not instill "any sensible expectations of job security or the belief that she could only be terminated for cause." *Duncan*, 183 Ariz. at 356, 903 P.2d at 1114. In so holding, the court noted the similarity between the hospital's disclaimer and the disclaimers in *Thomas* and *Chambers* — both of which stated that the employee was employed at will and that the employment relationship could be terminated by either party — but distinguished *Leikvold*, *Wagner*, and *Wagenseller*, where the handbooks contained no declarations about the at-will nature of the employment relationship or any disclaimers stating that handbook policies and procedures do not constitute an employment contract, and where the courts held that there were fact questions as to whether the handbooks became part of the employment contract.

Because ITT's pre-1989 manuals had no disclaimers, we cannot say that there are no fact questions under *Leikvold* as to whether the seniority provisions became part of the contract.

B

We must therefore decide whether ITT could abrogate Demasse's pre-1989 expectations about layoff priorities by issuing its new manual in 1989 (which did not change the layoff policy but which stated that ITT could change its policies and that nothing in the handbook should be construed as a guarantee of continued employment), or by changing the layoff policy itself in 1993. The employees contend that neither could wipe out their right to be laid off according to seniority because they relied on the seniority

provisions in the old handbooks, and because ITT could not change their deal without additional consideration. For this proposition Demasse relies on out-of-state cases,[3] and *Wagenseller*. ITT, on the other hand, submits that it was free as a matter of law to discard a layoff selection methodology that had become outdated. In support, it points to *Duncan* as well as to *Chambers* and *Bedow v. Valley National Bank*, 5 IER Cases 1678 (D. Ariz. 1988), where federal district courts applying Arizona law held that employers could unilaterally change "just cause" relationships to "at will" relationships.

We disagree with the employees to the extent they argue that pre-1993 seniority rights were somehow "accrued" and cannot be changed for that reason. While the Arizona Supreme Court recognized in *Wagenseller* that the denial of accrued benefits may breach the duty of good faith implicit in a contract (which is not pleaded here), we discern nothing in Arizona law that would treat rights to layoff in a certain order as a vested benefit. Rights to be laid off in a certain order, or to bump junior employees, are not akin to accrued benefits that the employer either doesn't pay or avoids paying by terminating employees. *Wagenseller*, 147 Ariz. 384, 710 P.2d at 1040.

The more difficult issue is whether ITT could unilaterally change layoff policies which were an enforceable part of the Demasse employees' contract of employment by issuing a new handbook in 1989 declaring

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[3] *Toth v. Square D Co.*, 712 F. Supp. 1231, 1235-36 (D.S.C. 1989); *Thompson v. Kings Entertainment Co.*, 653 F. Supp. 871, 875 (E.D. Va. 1987); *Enyeart v. Shelter Mut. Ins. Co.*, 693 S.W.2d 120 (Mo. App. 1985); *Langdon v. Saga Corp.*, 569 P.2d 524 (Okl. App. 1976).

that it could amend its handbooks and policies — and then by modifying its layoff policy in 1993. Three federal judges applying Arizona law (including the district court in this case) have said yes.

In *Chambers,* the employee had worked for Valley National Bank from 1971 until 1987, when she was terminated without cause. The handbook in force at that time contained clear and conspicuous disclaimers indicating that the contents of the handbook do not constitute the terms of a contract of employment and that employment with the Bank is on an "at will" basis. Chambers knew about the disclaimers and understood them. Nevertheless, she argued that she should not have been terminated except for cause, in accordance with the bank's disciplinary procedures, since the disclaimers did not appear in any handbook until 14 years after she was hired. The court concluded that under these circumstances, the employee could not reasonably have relied on the manual as creating employment that was not terminable at will. Further, the court held that the fact that the bank's disclaimers were a recent addition to the handbook did not keep them from having the intended effect. Judge Strand reasoned:

> The inclusion of the disclaimer in the 1985 publications may best be considered an offer of a modification to a unilateral contract of employment, which plaintiff accepted by continuing her employment with defendant. *See Pine River State Bank v. Mettille,* 333 N.W.2d 622, 626-27 (Minn. 1983); *see also Mattison v. Johnston,* 152 Ariz. 109, 112-13, 730 P.2d 286, 289-90 (App. 1986) (continued employment is sufficient consideration for the

> modification of an at-will employment contract to require the enforcement of a covenant not to compete added subsequent to the initial entry into the employment contract). Although an "employer is contractually bound to observe . . . [published] policies until they are modified or withdrawn," *Enyeart v. Shetter Mut. Ins. Co.*, 693 S.W.2d 120, 123 (Mo. App. 1985), he is free to modify his personnel policies prospectively. *Landgon v. Saga Corp.*, 569 P.2d 524, 527-28 (Okla. App. 1976); *see also Wagner*, 150 Ariz. at 85-86, 722 P.2d at 253-54.

Chambers, 721 F. Supp. at 1131-32.

Bedow involved a similar situation, with Judge Broomfield reaching a similar conclusion:

> [A]s a matter of basic contract law, each successive version of defendant's personnel policy manual modifies and supersedes prior issued versions. Courts in other jurisdictions have specifically so held, *see Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983); *Langdon v. Saga Corporation*, 569 P.2d 524 (Okla. App. 1986) while courts in Arizona have implicitly done so as in *Mattison v. Johnson*, 152 Ariz. 109, 730 P.2d 286 (App. 1986) where the court ruled that continued employment constituted sufficient consideration to enforce a new term or provision of employment in an "at will" employment relationship.
>
> Therefore, the personnel manual in effect at the time of plaintiff's termination is controlling in this case.

> That manual specifically provides that employment with defendant is on an "at will" basis and can be terminated at any time by either party. Any other conclusion would create chaos for employers who would have different contracts of employment for different employees depending upon the particular personnel manual in force when the employee was hired. Such a result would effectively discourage employers from either issuing employment manuals or subsequently upgrading or modifying personnel policies.

Bedow, 5 IER Cases at 1680.

Thus, federal district courts construing Arizona law have uniformly concluded that handbooks with disclaimers issued after *Leikvold* may supersede prior policies in handbooks that had no disclaimers. They have done so on the unilateral contract theory that continued employment is sufficient consideration to enforce a new term of employment in an at-will relationship.

No Arizona appellate decision has directly addressed the question whether, and under what circumstances, a personnel manual in effect at the time of an employee's termination supersedes previously issued manuals that have become part of the employment contract, but *Wagner* and *Duncan* suggest that the answer might be the same as that in *Chambers*. Like *Chambers*, *Wagner* starts from the premise that at-will employment relationships are unilateral contracts. However, the Arizona Supreme Court reiterated in *Wagner* that such contracts can be modified by personnel manuals that limit the employer's ability to discharge employees. Then in *Duncan*, while discussing the

employee's argument that disclaimers in the 1988 version of the handbook did not insulate the employer from liability for ignoring its termination procedures, the court of appeals remarked in a footnote:

> By mentioning the year (1988) of the handbook at issue and that she had no idea what was in any prior handbooks, Duncan seems to imply that the handbook's relative newness somehow minimizes the significance of the disclaimer contained within. A similar argument was rejected in *Chambers v. Valley Nat'l Bank of Arizona,* 721 F. Supp. 1128, 1131-32 (D. Ariz. 1988). There, the court stated that, because employment contracts can be modified at any time, employers were not precluded from having disclaimers become part of an implied-in-fact contract of employment. *Id.* at 1131.

Duncan, 183 Ariz. at 354 n.3, 903 P.2d at 1112 n.3. This statement comes close to being controlling authority, but we cannot be sure that the Arizona courts would embrace *Chambers's* unilateral contract analysis when a handbook that has come within the *Leikvold* exception has been superseded in the employer's favor. Nor is it clear what rationale would be adopted. *Leikvold,* for example, has been interpreted by some as resting on a theory of promissory estoppel rather than unilateral contract. *See, e.g., In re Certified Question,* 432 Mich. 438, 449 & nn.13-14, 443 N.W.2d 112, 117 & nn.13-14 (1989) (contrasting *Leikvold* line of authority suggesting that enforceability of handbook policy turns on individual employee's reliance, with *Chambers* line employing the unilateral contract theory to find offer and acceptance of

handbook provisions as terms of employment contract); Guy D. Keenan, Recent Decision, Employment, *Limiting Employment-At- Will in Arizona: Leikvold v. Valley View Community Hospital,* 27 Ariz. L. Rev. 235 (1985). Other courts have adopted quite different approaches. *See, e.g., Robinson v. Ada S. McKinley Community Servs., Inc.,* 19 F.3d 359, 364 (7th Cir. 1994) (applying Illinois law and concluding that acceptance and consideration for modification of manual cannot be inferred from employee's continued work); *In re Certified Question,* 432 Mich. at 453-56, 443 N.W.2d at 119-20 (permitting employers to modify handbooks provided employees receive reasonable notice of the change, but finding unilateral contract analysis to be an inadequate rationale); *see also* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers,* 13 Indus. Rel. L.J. 326 (1991/92) (discussing differing doctrinal approaches of courts considering whether employers may unilaterally alter handbook policies).

Rather than resolve the issue ourselves, it is preferable as a matter of comity to leave the decision, and supporting rationale, to Arizona's highest court.[4] Therefore, we respectfully ask for assistance on the following question:

> Once a policy that an employee will not be laid off ahead of less senior employees becomes part of

[4] In this we join two other circuits confronted with similar questions arising out of superseded handbooks who likewise certified the question. *See* Order, *McIlravy v. Kerr-McGee Corp.,* 98 F.3d 1255 (10th Cir. 1996) (vacating opinion, published at 74 F.3d 1017, in light of question certified to the Wyoming Supreme Court in *Brodie v. General Chemical Corporation,* No. 94-8095); *In re Certified Question,* 432 Mich. 438, 441 N.W.2d 112 (answering question certified by the Sixth Circuit).

the employment contract under *Leikvold v. Valley View Community Hospital,* 141 Ariz. 544, 688 P.2d 170 (1984), as a result of the employee's legitimate expectations and reliance on the employer's handbook, may the employer thereafter unilaterally change the handbook policy so as to permit the employer to lay off employees without regard for seniority?

III

Assuming that ITT is bound by the pre-1993 layoff policy, the employees also argue that they should not be barred from pursuing their claim for breach of contract for failure to exhaust internal complaint procedures described in the handbook. They contend that ITT's handbook was not applicable to their grievances because it applies to a "policy, rule or procedure in this handbook," whereas the grievances pertained to layoffs for which, as of April 19, 1993, there was no longer a handbook policy. This would not be the case, however, if Demasse were to prevail on his argument that ITT is contractually bound to the layoff policy in older handbooks.

ITT and the district court rely on *Thomas* and *Moses,* both of which require employees to exhaust on the footing that an employee must abide by all the terms in a handbook if the handbook is a part of the employment contract.[5]

[5] ITT also urges us to affirm on the ground that Demasse made no substantial argument on the issue to the district court in opposition to ITT's motion for summary judgment, but we decline to do so, as the district court had to be (and was) satisfied that the employees failed to

Demasse submits that *Thomas* and *Moses* are not persuasive because they rely on cases in which the employees were bound by arbitration provisions contained in a collective bargaining agreement, but neither is distinguishable on this basis. *Thomas* and *Moses* turn on the fact that the grievance procedures and the provisions the employees rely upon to modify the terms of their employment contract are part of the same handbook.

As there is no Arizona law on point, we must decide whether the Arizona courts would adopt the same rule as the federal courts. Demasse suggests that the Arizona Supreme Court would follow the approach of the Iowa Supreme Court in *Cannon v. National By-Products, Inc.*, 422 N.W.2d 638 (Iowa 1988), which requires an employer to show that the employee's promise to exhaust the handbook's grievance procedure "constituted the entire agreed exchange by the [employee], or was expressly recognized in the agreement as a condition for his own performance," *id.* at 642, before denying recovery to an employee who seeks benefits that the employment contract otherwise confers. ITT, on the other hand, submits that Arizona's strong policy favoring nonjudicial resolution of disputes supports exhaustion in this case.

Whether Arizona would consider informal grievance procedures part of a modified contract that binds employees is unclear, and we believe best left to the Supreme Court of Arizona to decide. For this reason, we also certify the following question:

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exhaust grievance procedures and their claim was therefore barred as a matter of law.

In order to sue for breach of contract on the ground that an employer is bound by representations made in its employee handbook, must employees exhaust the complaint procedure described in the same employee handbook?

IV

The Demasse employees argue that their cross-motion for summary judgment should have been granted because the pre-1993 provisions in ITT's handbooks constitute an implied-in-fact contract giving them enforceable rights to recover damages. For reasons that we have already explained, we defer to the Arizona Supreme Court on the questions that will control this requested relief.

ORDER

We find that questions of state law will be determinative of the claims currently pending in this court. We additionally find that there is no controlling precedent in the decisions of the Arizona Supreme Court or in the Arizona Courts of Appeals. Pursuant to Ariz. Rev. Stat. § 12-1861 (1994)[1] and Arizona Supreme Court Rule 27,[2] we accordingly certify the following two questions to the Arizona Supreme Court:

1. Once a policy that an employee will not be terminated ahead of less senior employees becomes part of the employment contract under *Leikvold v.*

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[1] Ariz. Rev. Stat. § 12-1861 provides that:

The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or a tribal court when requested by the certifying court if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the intermediate appellate courts of this state.

[2] Rule 27(a)(1) provides that:

A certification proceeding may be commenced in this court by filing with the clerk of this court a certification order from a federal court . . . .

Valley View Community Hospital, 141 Ariz. 544, 688 P.2d 170 (1984), as a result of the employee's legitimate expectations and reliance on the employer's handbook, may the employer thereafter unilaterally change the handbook policy so as to permit the employer to terminate employees without regard for seniority?

2. In order to sue for breach of contract on the ground that an employer is bound by representations made in its employee handbook, must employees exhaust the complaint procedure described in the same employee handbook?

We respectfully request the Arizona Supreme Court to exercise its discretionary authority under Arizona Supreme Court Rule 27 to accept and to decide these questions. Our phrasing of the question should not restrict the Court's consideration of the problems and issues involved. If the Arizona Supreme Court declines certification, it should so state, and we will resolve the issue according to our perception of Arizona law.

The Clerk will file with the Arizona Supreme Court an original and six certified copies of this Order and a list of the counsel appearing in this matter along with their addresses and telephone numbers, pursuant to Arizona Supreme Court Rule 27(a)(3)(c) & (a)(4). The panel retains jurisdiction over further proceedings in this court. If the Arizona Supreme Court answers in the affirmative to either question, we affirm the judgment of the district court, deny ITT's request for attorneys' fees incurred on appeal, and decline to reach the employees' claim that the district judge erroneously denied their motion for a jury trial pursuant to

Federal Rule of Civil Procedure 38. If the Arizona Supreme Court answers in the negative to both questions, we reverse the judgment of the district court and remand for further proceedings not inconsistent with the Arizona Supreme Court's opinion, deny ITT's request for attorneys' fees incurred on appeal, and affirm the district court's denial of the employees' untimely demand for a jury trial.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROGER DEMASSE, MARIA A. GARCIA, BILLY W. JONES, VIOLA MUNGUIA, GREG PALMER, and SOCORRO SOZA,	) No. CIV 94-1399 PHX ROS
Plaintiffs,	) **ORDER**
vs.	
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware Corporation d/b/a ITT CANON,	)(Filed March 9,1995)Clerk, US District)Court, District of)Arizona)By /s/ Deputy)
Defendant.	

On February 3, 1994, Plaintiffs Betty L. Allen, Margaret Vidaure, Ngoc Thi Widdowson, Roger Demasse, Maria A. Garcia, Billy W. Jones, Viola Munguia, Greg Palmer, Socorro Soza and Joseph W. Sullivan filed a Complaint with this Court alleging breach of contract. On February 23, 1994 Defendant International Telephone and Telegraph (ITT) filed a motion to sever the action into three lawsuits. ITT proposed that the first lawsuit include Plaintiffs Allen, Vidaure and Widdowson. The second lawsuit was proposed to include Plaintiffs Demasse,

Munguia, Palmer, Soza, Jones and Garcia. Sullivan was to be the sole Plaintiff in the third lawsuit. This motion was granted by a minute entry dated May 16, 1994. A written order was issued on July 14, 1994 confirming the minute entry. The instant case is the first lawsuit, which retained the original case number. The lawsuit involving the Demasse Plaintiffs was renumbered CIV 94-1399. The Answer in CIV 94-267 was filed on July 8, 1994. There is no date on the Answer filed in CIV 94-1399. On November 21, 1994, Plaintiffs filed a Motion for Leave to Request Trial by Jury in both cases. Plaintiffs cite inadvertence as the cause of their failure to file a jury demand.[1] For the reasons set forth below, the Court finds that the Plaintiffs are not entitled to a jury trial in either case.

[1] To support his claim of inadvertence, counsel for the plaintiffs, Jack Levine, filed an affidavit in which he stated that he "had not practiced in the U.S. District Court for at least twenty years before [filing the complaint in this action]." The Court independently determined that Mr. Levine was counsel in approximately eight actions brought in Federal District Court for the District of Arizona in 1993 and 1994 and that in Miller v. State Farm Ins. Co., CIV 94-0399 PHX PGR as plaintiffs' counsel he filed on February 18, 1994 a demand for a jury trial. In light of this discovery the Court was extremely troubled by Mr. Levine's seemingly clear and unequivocal denial of involvement or association with federal court cases for "twenty years." Mr. Levine's explanation at the hearing on this motion, though evincing recklessness, extremely poor judgment and incompentence did not appear to the court to be an intentional false statement made under oath.

THE LAW

Rule 38(b) of the Federal Rules of Civil Procedure provides that any party may demand a trial by jury of any issue "triable of right by a jury" by serving a written demand upon the other party not later than ten days after service "of the last pleading directed to such issue." Rule 38(d) provides that failure to serve a demand as required by Rule 38(b) "constitutes waiver by the party of trial by jury." Clearly, Plaintiffs did not serve their demand within ten days of the date Defendant filed its Answer, the last pleading directed to the issues in this case.

Rule 39(b) of the Federal Rules of Civil Procedure provides in relevant part:

> [N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any and all issues.

Although a district court has discretion to order a jury trial upon a motion by a party that has not timely filed a demand for one, in the Ninth Circuit that discretion does not permit a district court to grant relief where the failure to timely file a demand is the result of "oversight" or "inadvertence." Craig v. Atlantic Richfield Co., 19 F.3d 472, 477 (9th Cir. 1994); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984); Lewis v. Time Inc., 710 F.2d 549, 557 (9th Cir. 1983).

Plaintiffs cite several cases from other circuits which hold that motions under Rule 39(b) should be granted unless they will result in prejudice, delay or waste of judicial resources. See, Sullivan v. School board of Pinellas County, 773 F.2d 1182 (8th Cir. 1985); Pinemont Bank v. Belk, 722 F.2d 232 (5th Cir. 1984); Merritt v. Faulkener, 697 F.2d 761 (7th Cir. 1983) cert. denied 464 U.S. 986 (1983); Littlefield v. Fort Dodge Messinger, 614 F.2d 581 (8th Cir. 1980) cert. denied 445 U.S. 945 (1980); Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964) cert. denied 379 U.S. 962 (1965); Tavoulareas v. Piro, 93 F.R.D. 11 (D.D.C. 1981); Davis-Watkins Co. v. Service Merchandise Co., 500 F. Supp. 1244 (9th Cir. 1982) aff'd 686 F.2d 1190 (6th Cir. 1982). However, different circuits have different rules. "It is the rule in some courts that 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' Elsewhere, the judicial attitude is almost diametrically the opposite. Thus, it has been held that a court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default." Wright & Miller, Federal Practice & Procedure: Civil 2d § 2334 (1995) (citations omitted). Clearly, the circuits that the Plaintiffs cite fall closer to the former category and the Ninth Circuit falls closer to the latter category. Thus, the Plaintiffs' citations are neither controlling or persuasive.

THE FACTS

In their Motion for Leave to Request Trial by Jury, Plaintiffs state that they neglected to file a demand for jury trial because the Defendant's Motion to sever delayed the filing of the Answer until many months after the Complaint

was filed. They characterize the failure to demand a jury trial as "inadvertent." Under Ninth Circuit law, this Court does not have the discretion to grant a jury trial after the period specified under Rule 38(b) when the delay is due to inadvertence or inexcusable neglect. Craig, 19 F.3d at 477; Blau, 748 F.2d at 1357; Lewis, 710 F.2d at 557.

In their reply, the Plaintiffs provide more details about their failure to demand a jury trial. They say that Plaintiffs' counsel's lack of familiarity with federal court "may" have led to the delayed realization that a demand should have been filed earlier. However, the Ninth Circuit has upheld the denial of trial by jury on the grounds that the attorney was not certified to practice in federal court and mistakenly thought that no demand was necessary under Rule 81(c). Beckham v. Safeco Ins. Co. of America, 691 F.2d 898 (9th Cir. 1982).

Plaintiffs also argue that the confusion created by the severance of the case into three separate cases contributed to the failure to file the demand. This is also no more than inadvertence, especially when the demand could have been made in the Complaint. In addition, Plaintiffs state that, when they stipulated to a delay in filing the answer, the answer was not attached to the stipulation as the stipulation required. It is unclear how this assists the Plaintiffs.

Plaintiffs also argue that the late request should be excused because it was caused by the fact that a new secretary filed the Answers without showing them to counsel, and, furthermore, filed them in the wrong place. Because the Court finds that counsel's secretary's errors constitute nothing more than "oversight" and

"inadvertence," this argument is of no avail to the Plaintiffs.

Plaintiffs also argue that Plaintiffs' counsel may have lost track of the pleadings because of the severance of the cases and the resultant multiplicity of pleadings. However, the fact that the lawyer was swamped with work is not an adequate excuse. Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 987-88 (9th Cir. 1980).

The Plaintiffs do not claim that their Motion for Leave to Request a Jury Trial should be granted because the time between the deadline in Rule 38(b) and their Motion is short, but the Defendants note that the Ninth Circuit has held that the District Court did not abuse its discretion in refusing to allow untimely jury demands when the demand was late by two months, Blau 748 at 1357, or four moths, Beckham v. Safeco Ins. Co., 691 F.2d 898 (9th Cir. 1982). In the instant case the demand is five months late.

Accordingly,

IT IS ORDERED denying Plaintiffs' Request for Jury Trial (Doc. 38).

DATED this 9th day of March, 1995.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

copies to all counsel of record

APPENDIX B

OTHER RELEVANT OPINIONS AND ORDERS ENTERED IN THE CASE

July 14, 1994 District Court Order
(notifying Petitioners that Respondent filed its Answer, and severing original case into three separate actions) B-2

November 9, 1994 District Court Order
(transferring case to Judge Roslyn O. Silver) B-4

May 24, 1995 District Court Order
(granting summary judgment in favor of Respondent) B-5

March 4, 1996 District Court Order
(denying Motion to Alter/Amend Judgment) B-23

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

BETTY L. ALLEN, ROGER DEMASSE, MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER, SOCORRO SOZA; JOSEPH W. SULLIVAN, MARGARET VIDAURE and NGOC THI WIDDOWSON, Plaintiffs	No. CIV 94-0267 PHX-RGS **ORDER** (Assigned to the Honorable Roger G. Strand)
vs.	(Filed July 14, 1994 Clerk U.S. District of Arizona by /s/ Deputy)
ITT CORPORATION, a Delaware Corporation dba ITT CANNON, Defendant	

Upon Stipulation and for good cause being shown,

IT IS HEREBY ORDERED,

1. That the Court severs the attached cases in accordance with its Minute Entry dated May 16, 1994;

2. That the Answers filed herein as Exhibits 1, 2 and 3 are timely responsive pleadings to the severed claims; and

3. That the Defendant's name will also be changed on each of the severed claims to ITT Corporation, a Delaware corporation with its principal place of business in New York City dba ITT Cannon, Defendant. The appropriate caption for each case will now read as follows:

a. ROGER DEMASSE, MARIA A. GARCIA, BILLY W. JONES, VIOLA MUNGUIA, GREG PALMER, and SOCORRO SOZA, Plaintiffs, vs. ITT CORPORATION, a Delaware corporation dba ITT CANNON, Defendant.

b. BETTY L. ALLEN, MARGARET VIDAURE and NGOC THI WIDDOWSON, Plaintiffs, vs. ITT CORPORATION, a Delaware corporation dba ITT CANNON, Defendant.

c. JOSEPH W. SULLIVAN, Plaintiff, vs. ITT CORPORATION, a Delaware corporation dba ITT CANNON, Defendant.

DONE IN OPEN COURT THIS DATE: 7/11/94.

/s/ Roger G. Strand

HONORABLE ROGER G. STRAND
Judge of the U.S. District Court

United States District Court
for the District of Arizona
November 9, 1994

NOTICE OF REASSIGNMENT

Case No. 2:94-cv-01399 - ROS

Title: Demasse v. ITT Corporation

DOCKET ENTRY

The Court has ORDERED that the above captioned matter is reassigned to Judge Roslyn O. Silver for all further proceedings. Any scheduled hearing, conference, or trial in this action is vacated and will be reset by the Court. All further pleadings and papers filed in this action should bear the complete case number and judge's initials, as shown above. [32-1]

CASE ASSIGNED TO:
Hon. Roslyn O Silver, Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROGER DEMASSE, et al.,	) CIV 94-1399
	) PHX-ROS
Plaintiff,	)
	) **ORDER**
	)
vs.	) (Filed
	) May 24, 1995
ITT CORPORATION,	) Clerk U.S.
	) District Court
Defendant.	) by /s/)
	)
	)

On February 3, 1994, Plaintiffs filed a Complaint with this Court. On July 11, Judge Strand issued an order severing the original case into three separate actions, one of which is the instant case. In this case Plaintiffs allege that they were laid off in breach of a contract provision requiring that layoffs be carried out according to seniority. This Court has jurisdiction under 28 U.S.C. § 1332.

On November 16, 1994, Plaintiffs filed a Motion to Amend the Complaint. An Amended Memorandum of Law was filed on December 15, 1994. On February 14, 1995 Defendant ITT filed a Motion to Sever. Also on February 14, 1995, Defendant ITT filed six separate Motions for Summary Judgment, one against each of the Plaintiffs in this case. The Plaintiffs are Roger Demasse, Billy W. Jones, Greg Palmer, Marcia A. Garcia and Socorro Soza.

Defendants [sic] responded and filed a Cross-Motion for Summary Judgment on March 10, 1995. A hearing was held on the Motions on May 22, 1995.

Background

This action arises from layoffs at ITT's Phoenix facility caused by the decrease in expenditures by the Federal Government for Defense. (DSOFI at ¶ 2, 3; DSOFII at ¶ 2, 3; DSOFIII at ¶ 2, 3; DSOFIV at ¶ 2, 3; DSOFV at ¶ 2, 3; DSOFVI at ¶ 2, 3)[1] Between January 1990 and May 1992, ITT reduced the number of hourly production workers from 132 to 68. (DSOFI at ¶ 4; DSOFII at ¶ 4; DSOFIII at ¶ 4; DSOFIV at ¶ 4; DSOFV at ¶ 4; DSOFVI at ¶ 4) Further layoffs were necessary in 1993 and decreased the labor force to 49. (DSOFI at ¶ 6; DSOFII at ¶ 6; DSOFIII at ¶ 6; DSOFIV at ¶ 6; DSOFV at ¶ 6; DSOFVI at ¶ 6). In 1994 the labor force was decreased to 36. (DSOFI at ¶ 6; DSOFIV at ¶ 6) It is the layoffs in these last two years that form the subject matter of the instant case.

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[1] The abbreviations used are: DSOF - Defendant ITT Cannon's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment; if no roman numeral is appended the information is found in the same paragraph of the Facts for each Plaintiff; DSOFI is for the motion against Plaintiff Billy W. Jones; DSOFII is for the motion against Plaintiff Roger Demasse; DSOFIII is for the motion against Plaintiff Greg Palmer; DSOFIV is for the Motion against Plaintiff Maria A. Garcia; DSOFV is for the motion against Plaintiff Viola Munguia; DSOFVI is for the motion against Plaintiff Socorro Soza; PSOF is Plaintiffs, Statement of Facts in opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment.

Plaintiffs Roger Demasse, Socorro Soza and Greg Palmer were laid off on April 29, 1993. (DSOFII at ¶ 23; DSOFIII at ¶ 23; DSOFVI at ¶ 22) Next, Plaintiff Viola Munguia was laid off on May 4, 1993. (DSOFV at ¶ 17). Finally, Plaintiffs Billy W. Jones and Maria Garcia were laid off on January 10, 1994. (DSOFI at ¶ 22; DSOFIV at ¶ 23).

Did the ITT Handbooks Issued to the Employees create an "Implied in Fact Contract?"

In Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984), the Arizona Supreme Court held that if an employer issues a personnel policy manual or handbook upon which its employees may reasonably rely, the employer may not treat the contents of these documents as illusory. Consequently, the contents of a personnel manual or handbook can become part of an enforceable contract of employment. See also, Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 381-382, 710 P.2d 1025, 1036-37 (1985); Thomas v. Garrett Corp., 744 F. Supp. 199, 201 (D. Ariz. 1989) aff'd 904 F.2d 41 (9th Cir. 1990); Chambers v. Valley Nat'l Bank, 721 F. Supp. 1128, 1131 (D. Ariz. 1988); Bedow v. Valley National Bank, CIV 88-417 PCT RCB (D. Ariz. Oct. 6, 1988). Whether the handbook creates an implied contract depends on the language in the handbook as well as the course of conduct of the employer. Leikvold, 141 Ariz. at 548, 688 P.2d at 174.

A related issue is whether the terms of an employment contract created by one handbook can be superseded by a subsequent handbook. The Chambers court held that the parties were free to change the terms of an employment

contract at any time. Chambers, 721 F. Supp. at 1131, citing Wagner v. City of Globe, 150 Ariz. 82, 85-86, 722 P.2d 250, 253-54 (1986). The decision of the employee to continue to work for the employer is consideration for the change. Id. at 1131-32, citing Mattison v. Johnston, 152 Ariz. 109, 112-13, 730 P. 2d 286, 289-90 (Ct. App. 1986).[2] Chaos would result if the employer was bound by prior handbooks and employees hired at different times when different handbooks were in effect were under different contracts. Bedow v. Valley National Bank.

Plaintiffs challenge their layoffs as breaches of seniority provided for in their employment contracts. They claim that pre-1989 employee handbooks created an employment contract between them and ITT under which layoffs would be made by seniority. (DSOFI ¶ 32; DSOFII at ¶ 30; DSOFIII at ¶ 38; DSOFIV at ¶ 30; DSOFVI at ¶ 29).

In the instant case, the pre-1989 employee handbooks stated that employees would be selected for layoff by their length of service. (DSOF at ¶ 8; PSOF at ¶ 2) Defendants do not dispute that these pre-1989 handbooks create a contract term requiring layoffs to be made according to seniority. Significantly, the pre-1989 handbooks do not contain language that clearly and conspicuously informed the employees that the handbook was not part of the

---

[2] It is noted that some courts have required more proof that the employee accepted the new contract than merely continuing to work. Thompson v. Kings Entertainment Co., 653 F. Supp. 871, 876 (E.D.Va. 1987); Toth v. Square D Co., 712 F. Supp. 1231, 1236-37 (D. S.C. 1989) which has been in Fleming v. Borden Inc., 450 S.E. 2d 589 (S.C. 1994) criticized as applying bilateral contract concepts to a unilateral contract. In Fleming the court held that mere actual notice was necessary to modify the contract.

employment contract and that their jobs were terminable at the will of the employer with or without reason. (DSOF at ¶ 8, Ex. E)

A revised handbook was published in 1989. (DSOF at ¶ 9; PSOF at ¶ 4) This handbook also stated that layoffs would be carried out according to seniority. (p. 36 of Exhibit F to DSOF; PSOF at ¶ 2). However, on page one of the new handbook there was a disclaimer stating that the contents shall not be construed as a guarantee of continued employment, and that ITT reserves the right to layoff employees. (DSOF at ¶ 10) The first page also states that ITT reserved the right to amend, modify or cancel the handbook or the policies, rules or procedures contained in it. (DSOF at ¶ 11; PSOF at ¶ 4). Finally, the new handbook stated that the specific "provisions of policies, rules, procedures and programs supersedes the contents" of the handbook. (DSOF Exhibit F at page 1).

All of the Plaintiffs signed a receipt for the new 1989 handbook stating that they had received the handbook, understood that it was their responsibility to read it, comply with its contents, and contact Personnel if they had any questions concerning the contents. (DSOFI at ¶ 12; DSOFII at ¶ 12; DSOFIII at ¶ 12; DSOFIV at ¶ 12; DSOFV at ¶12; DSOFVI at ¶12). In addition Jones (DSOFI at ¶ 13) Palmer (DSOFIII at ¶ 13) and Soza (DSOFVI at ¶ 13) admitted that they read the handbook including the disclaimers on page one. Jones (DSOFI at ¶ 16) Demasse (DSOFII at ¶ 18), Garcia (DSOFIV at ¶ 17) and Soza (DSOFVI at ¶ 16) admitted that they understood that ITT had the right to amend, modify or cancel provisions in the handbook. Munguia admits that in May 1989 she was advised that ITT Cannon was reserving the

right to "amend modify or cancel" the handbook "as well as any or all of the various policies, rules, or procedures and programs within it". (Munguia Affidavit at ¶ 7) It is therefore clear that Plaintiffs continued to work for Defendant after they had read or were aware of the statement that the provisions of the handbook could be changed.

The first issue is whether, as Defendant claims, the statements in both the handbooks "conspicuously tells [ITT's] employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason," Leikvold, 688 P.2d at 174. Neither of the handbooks i.e., the pre-1989 contract or the 1989 contract satisfy this requirement. Nowhere in the handbooks does the language appear that the employment relationship was "at will". See Bedow v. Valley National Bank. Also, in Thomas v. Garrett Corp., relied upon by the Defendants, the employee had completed and signed a separate employment contract stating that his employment contact was terminable at will by either party. In particular immediately above the place for the applicant's signature there was a notice to "PLEASE READ CAREFULLY" and text which followed which made clear that the company could terminate him with or without cause and with or without notice at any time. Finally, in Chambers v. Valley National Bank, also relied upon by the Defendants, the handbooks contained distinct disclaimers prominently displayed in their introductory paragraphs which plainly communicated that the handbook was only a guideline and that they did "NOT CONSTITUTE THE TERMS OF A CONTRACT OF EMPLOYMENT." Further the handbooks stated that

nothing in the handbook should be construed as a guarantee of continued employment, but employment was at will.

The handbook language in the instant case contains no such clear and conspicuous language. The statement that "ITT Cannon does not guarantee continued employment to employees and retains the right to terminate or layoff employees" (DSOF, exhibit F, p.1) could be read to mean that termination or layoff will always be completed according to the terms provided in the handbook. It does not "conspicuously tell" the employee that the handbook does not create an employment contract as were the facts in Bedow, Garrett Corp., and Chambers. Nor does the statement "ITT Cannon reserves the right to amend, modify or cancel this handbook, as well as any or all of the various policies, rules procedures and programs outlined within it" (DSOF exhibit F at p. 1) "conspicuously tell" the employee that the manual is not part of the employment contract.

Thus, as in Leikvold where entry of summary judgment was inappropriate "[b]ecause a material question -- whether the policy manual was incorporated into and became part of the terms of the employment contact -- remain in dispute" summary judgment is inappropriate here. Id. at 174. As the Supreme Court of Arizona held in Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985) the general rule is that the determination whether in a particular case a promise should be implied in fact is a question of fact and where reasonable minds may draw different conclusions or inferences from undisputed evidentiary facts, a question of fact is presented. See also, Loffa v. Intel Corp., 153 Ariz. 539, 738 P.2d 1146, 1151 (Ariz. App. 1987) (The court held that the general statement in the "Employee Agreement" that "[t]his

Agreement . . . does not in any way restrict my right or the right of Intel to terminate my employment . . ." is not enough to remove the issue of the effect of Intel's "Non Exempt Discipline Policy" on the employment relationship from the jury's consideration.)

This Court finds that reasonable persons could differ on the inferences and conclusions they might draw on whether Defendant's handbook became a part of the Plaintiffs' employment contracts.

Assuming that both the Handbooks Where [sic] a Part of the Plaintiffs/Employees Contracts did the Defendant's Breach the Contracts?

The first issue is whether the terms in the new 1989 handbook mean that the terms of the older handbooks no longer apply. This question is answered in the affirmative under the interpretation of Arizona law in Chambers as set forth above. It is clear from the facts that the employees were aware of or read the terms of the 1989 handbook which allowed ITT to amend, modify or cancel the handbook and then they continued their employment.[3] Plaintiffs now generally state, however, that they did not understand that the new provisions of the handbook amended or cancelled their seniority benefits which they purported earned in previous years and that Defendant breached the contract by changing the layoff procedure to one based on performance. The Plaintiffs argue that the length of time that the seniority policy existed created

---

[3] Courts have held that mere notice of change is enough for a unilateral contract. Rowe v. Montgomery, 473 N.W.2d 268 (Mich. 1991); Grave v. General Products, Inc., 457 N.W.2d 167 (Mich. 1990).

"benefits" which could not be taken by mere modification of the handbook. Plaintiffs cite no Arizona case law to support their position. What is more, Chambers holds otherwise. (PSOF at ¶ 4)

The Restatement (Second) of Contracts § 202(3) states:

> (a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
>
> (b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.

"Whether a contract is ambiguous or uncertain is a question of law and the mere fact that the parties disagree as to the meaning of its terms does not, in and of itself, establish its ambiguity." Grossman v. Hatley, 21 Ariz. App. 581, 585, 522 P.2d 46, 50 (1974). Finally, in Leikvold, 688 P.2d at 174 although the court reversed the finding by summary judgment that the manuals did not create an implied in fact contract the court instructed that if on remand the court found that the "terms of [the] agreement [were] clear and unambiguous, the construction of the contract is a question of law for the court."

In the instant case assuming that the handbooks created an implied in fact contract it is clear that the 1989 amendment plainly allowed ITT Cannon to make any amendments to the handbook deemed appropriate as long as certain procedures were followed. Thus, the Court finds that the 1989 revision of the handbook allowed ITT Cannon to amend the provision relating to layoffs. The 1989

revision was then followed by the 1993 revision which plainly states that it is a "REVISED LAYOFF POLICY" which "supersedes" the Handbook. There is no reasonable inference which can be drawn from a reading of these provisions but that whatever layoff policy existed prior to 1993 was changed and authorized by the 1989 amendment to the handbook and approved by the Plaintiffs.

Even if this Court were to consider extrinsic evidence to interpret the meaning of the handbook, as authorized in Taylor v. State Farm Mutual Automobile Ins. Co., 175 Ariz. 148, 854 P.2d 1134 (1993) adopting the Corbin view of contract interpretation, the result would be the same. Plaintiffs' merely offer, without explanation, that they just did not interpret the provision reserving the right "to amend, modify or cancel" the Employees Handbook, "as well as any or all of the various policies, rules, procedures and programs outlined within it" as permitting ITT Cannon to cancel their seniority and layoff policies. (¶ 8 of the Affidavits of Demasse and Garcia and ¶ 7 of all other Plaintiffs). In particular in Plaintiff Maria Garcia's deposition the following colloquy occurred:

> Question: What is in page one that led you to believe that ITT Cannon could not change its layoff policy?
>
> Answer: The very first part of that paragraph where it says "quote within the limits allowed by law."
>
> Question: What leads you to believe that phrase did not allow ITT Cannon to change its layoff policy?

Answer: Back to the seniority, you know. How can they take our seniority like that you know?

Question: So the phrase you are referring to is within the limits allowed by law, correct? Is there a particular law that you are referring to, that you believe that kept ITT Cannon from changing the layoff policy?

Answer: Yes, because it is wrong just to change like this.

Question: Do you think the law--

Answer: Yeah. They can do it, but it's wrong.

Question. You stated they can do it, but its wrong?

Answer: We can do anything we want, right, but is it right?

Question: Are you aware of any law that prohibited ITT Cannon from changing their layoff policy?

Answer: I'd rather not answer that.

The statement that "[a]ny amendment or modification will be communicated to the affected employees, and, while the handbook provisions are in effect, will be consistently applied," (DSOF exhibit F at p. 1), is a contract term allowing the contact provisions to be changed

only by a specific procedure. The question is therefore whether Defendant ITT followed the steps required in the contract provision.

On March 18, 1993, ITT issued a revised layoff policy that specifically stated that it superseded prior handbooks. (DSOFI at ¶ 18; DSOFII at ¶ 19; DSOFIII at ¶ 19; DSOFIV at ¶ 18; DSOFV at ¶ 14; DSOFVI at ¶ 17; PSOF at ¶ 3). This policy stated that work reductions were now to be based on abilities and documented performance. (DSOFI at ¶ 18-19; DSOFII at ¶ 19-20; DSOFIII at ¶ 19-20; DSOFIV at ¶ 18-19; DSOFV at ¶ 14-15; DSOFVI at ¶ 18). Plaintiffs received copies of this policy. (DSOFI at ¶ 21; DSOFII at ¶ 22; DSOFIII at ¶ 22; DSOFIV at ¶ 21). Thus, the contractual requirement that the change be communicated to the effected employee was met. Plaintiffs do not claim that the other contractual requirement, that the new policy be consistently applied, was not met.

It follows that as a matter of law assuming that the handbooks created an implied in fact contract Defendant did not breach the contract. Summary Judgment is therefore granted.

Did the Employees fail to exhaust grievance procedures?

Federal Courts have held that, under Arizona law, an employee is barred from pursuing civil remedies until she has exhausted the employer's grievance procedures as described in the employee handbooks. Moses v. Phelps Dodge Corp., 818 F. Supp. 1287, 1290 (D. Ariz. 1993) (handbook said that the grievance procedures that it contained were the exclusive procedure for processing any

dispute arising from, among other things, termination from employment); Thomas v. Garrett Corp., 744 F. Supp. 199, 203 (D. Ariz. 1989) (handbook provisions not described, but the court applied the provisions to a layoff). These two cases are based on Payne v. Pennzoil Corp., 138 Ariz. 52, 55-56, 672 P.2d 1322, 1325-26 (Ct. App. 1983), which actually deals with the requirement to arbitrate. ITT has established a complaint procedure and the procedure is contained in the 1989 and pre-1989 employee handbooks. (DSOFI at ¶ 33). The grievance procedure does not specifically say that it should be used for layoffs. There is also an ombudsman (DSOFI at ¶ 34).

Defendants claim that Plaintiffs did not complete the complaint procedure, contained in the employee handbook, and ombudsman program provided by ITT for either the 1989 or 1993 changes in the Handbooks or when they were actually laid off. (DSOFI at ¶ 33-35; DSOF II at ¶ 31-33; DSOFIII at ¶ 39-41; DSOFIV at ¶ 31-33; DSOFVI at ¶ 30-32) However, the notice concerning the ombudsman that was sent to employees stated that the ombudsman was not intended to deal with routine personnel matters, but rather was intended to handle criminal or unethical behavior. (Exhibit J to DSOFIII; Exhibit I to DSOF I, II, IV, VI; Exhibit H to DSOFV) Plaintiffs would therefore not be expected to contact him/her about a layoff.

There is sufficient evidence to establish as a matter of law that the Plaintiffs did not complete the grievance procedure for changes in the handbook or layoffs.

Under the grievance procedure the employee first talks to his supervisor about the problem, then goes to the next level of management, then to the personnel department and

then to the Division General Manager. (DSOF exhibit E at p. 22; Exhibit F at p. 24). With the exception of Munguia, Plaintiffs admitted that they did not discuss the revised handbook with the personnel department. (DSOF at ¶ 14) Plaintiffs all state that they did not discuss their layoffs with any one at ITT. (DSOFI at ¶ 33; DSOFII at ¶ 31; DSOFIII at ¶ 39; DSOFIV at ¶ 31; DSOFV at ¶ 30; DSOFVI at ¶ 30) It is therefore clear that Plaintiffs failed to exhaust grievance procedures and their claim is therefore barred on this ground as well.

It should be noted that Plaintiffs did not address the issue of exhaustion of grievance procedures in their response. Rule 56(e) of the Federal Rules of Civil Procedure states that "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Importantly, the Rule also states, "[i]f the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party." See Schneider v. TRW, Inc., 938 F.2d 986, 990, n.2 (9th Cir. 1991) (parties are not relieved from filing material in opposition to the other party's motion).

Clearly, as set forth above there is a basis in law for granting Defendant's summary judgment for Plaintiffs' failure to comply with the grievance procedures.

Even if seniority is applied Munguia will not prevail.

Munguia was the least senior person in her job classification. Hence, she would have been laid off even under the old seniority system. (DSOFV at ¶ 20) Also, she could not be considered for seniority in her previous jobs because she was least senior in one and the others no longer existed. (DSOFV at ¶ 8, 28) Therefore Munguia would not prevail even under the seniority system.

Motion to Sever

The Motion to Sever is denied as moot.

Attorney's Fees Under Ariz. Rev. Stat. § 12-341.01

Ariz. Rev. Stat. § 12-241.01 provides, in part:

> A. In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees . . .
>
> C. Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith. In making such award, the court may consider such evidence as it deems appropriate and shall receive this evidence during trial on the merits of the cause or separately,

> regarding the amount of such fees as it deems in the best interest of the litigating parties.

Defendants have presented no evidence that the purpose of this suit was harassment or that it was brought in bad faith, two of the required elements for awarding attorney's fees. Therefore Defendant has failed to demonstrate these requirements by clear and convincing evidence and attorney's fees will not be awarded.

PLAINTIFFS CROSS MOTION FOR SUMMARY JUDGMENT

Because Defendants Motions are granted, Plaintiffs' Cross Motion for Summary Judgment (Doc. # 71) is denied.

PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

Plaintiffs have moved to amend their Complaint to include an action in tort for the breach of the implied covenant of good faith and fair dealing.

Motions to amend the [C]omplaint are governed by Rule 15 of the Federal Rules of Civil Procedure. Rule 15(a) provides that, after the responsive pleading has been filed, a party can only amend the pleading with leave of the court or permission of the adverse party, and that leave of the court shall be freely given when justice so requires. The factors that are considered in determining whether a motion for leave to amend is to be denied are whether there has been undue delay, bad faith, or a dilatory motive and

whether the amendment would be futile. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Poling v. Morgan, 829 F.2d 882, 886 (9th Cir. 1987). A motion to amend may also be denied if it will result in prejudice to the opposing party. Foman, 371 U.S. at 182, 83 S.Ct. at 230; Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

In the instant case Defendant filed an answer on July 8, 1994. Plaintiffs therefore must have leave of the Court before they can amend their Complaint. Plaintiffs' Motion is denied because it is futile.

Arizona Courts have rejected an action in tort for breach of the covenant of good faith in the employment context. Wagenseller, 147 Ariz. at 385-86, 710 P.2d at 1040-41 (at will contract); Woerth v. City of Flagstaff, 167 Ariz. 412, 808 P.2d 297, 303 n.7 (Ct. App. 1990) ("Although Woerth refers to his claim for breach of good faith and fair dealing as a claim sounding in tort, Arizona has consistently refused to recognize a tort action for breach of the implied covenant in the employment context."); Nelson v. Phoenix Resort Corp., 888 P.2d 1375, 1385 (Ct. App. 1994) ("every Court that has considered Wagenseller has construed its holding to prohibit a tortious "bad faith" cause of action arising out of breach an employment agreement where no public policy is violated, whether the employee was "at-will" or tenured by contract").

Accordingly,

IT IS ORDERED that Defendant's Motions for Summary Judgment (Doc #s 53, 55, 57, 59, 61 & 63) are granted.

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Summary Judgment (Doc. # 71) is denied.

IT IS FURTHER ORDERED that Defendants' Motion to Sever (Doc. # 51) is denied as moot.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Amend the Complaint (Doc. # 33) is denied.

DATED THIS 23rd day of MAY, 1995.

/s/ Roslyn O. Silver
ROSLYN O. SILVER
UNITED STATES DISTRICT
JUDGE

copies to all counsel of record

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROGER DEMASSE, et al.,	) No. CIV 94-1399
	) PHX-ROS
Plaintiffs,	)
	) **O R D E R**
vs.	)
	) (Filed
INTERNATIONAL TELEPHONE	) March 5, 1996
AND TELEGRAPH CORPORATION,	) Clerk
a Delaware corporation dba ITT	) U.S. District
CANNON,	) Court
Defendant.	) District of
	) Arizona by
	) /s/ Deputy)

On May 23, 1995, this Court granted Defendant's Motion for Summary Judgment and denied Plaintiffs' Cross-Motion for Summary Judgment. Within ten days thereafter, as provided by Federal Rule of Civil Procedure 59(e), Plaintiffs filed a Motion to Alter or Amend the Judgment. Defendant filed a Response to the Motion. On July 7, 1995, Plaintiffs filed a Reply to Defendant's Response together with a "Motion for Leave to Amend its [sic] Motion." Defendant filed a Response to Plaintiffs' Motion for Leave to Amend. Plaintiffs filed a Reply and Supplement to the Reply to their Motion for Leave to Amend.

Governing Legal Principles

A motion seeking reconsideration of a summary judgment is appropriately brought under Federal Rule of Civil Procedure 59(e). Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985). Such a motion, however, may not be used to relitigate old matters or to raise arguments or present evidence that could have been raised prior to entry of judgment. 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2810.1 at 127-28. Motions under Rule 59(e) have been granted upon four basic grounds. First, the movant may demonstrate that reconsideration is necessary to correct manifest errors of law or fact upon which the judgment was based. F.D.I.C. v. World University, Inc., 978 F.2d 10 (1st Cir. 1992). Second, the motion may be granted so that the moving party may present newly discovered previously unavailable evidence. Id. Third, the motion will be granted if necessary to prevent manifest injustice. Database American, Inc. v. Bell South Advertising & Pub. Corp., 825 F. Supp. 1216 (D.N.J. 1993). Fourth, the motion may be justified by an intervening change in the controlling law. Id.

Analysis

A. Plaintiffs' Original Motion to Alter or Amend Judgment

Plaintiffs' original Motion to Alter to Amend the Judgment, which was timely filed, constitutes nothing more than an attempt to relitigate issues that the Court previously considered and resolved in the Order granting Defendant's Motion for Summary Judgment and denying Plaintiffs' Motion. In particular, Plaintiffs vigorously argue the issue

of exhaustion of the internal contractual remedies. It is noteworthy that Plaintiffs completely failed to dispute this issue in connection with the Cross-Motions for Summary Judgment. Summary judgment was completely warranted on this issue because the record before the Court presented no factual or legal dispute. The record revealed that detailed grievance procedures were in place to deal with disputes such as those presented by Plaintiffs and that they made no attempt to utilize those procedures. The law in Arizona plainly provided that the Plaintiffs were contractually bound by the grievance procedures that they failed to invoke.

Although Plaintiffs do raise some new arguments, they offer no legitimate reasons for having failed to place these before the Court when it considered the Cross-Motions for Summary Judgment. What is more, the arguments are meritless. First, Plaintiffs maintain that their failure to exhaust contractual remedies was excused by the Defendant's alleged breach of the contract. The authorities cited are inapposite. Plaintiffs also cite to case law from districts in which the law is contrary to Arizona law as set forth in Thomas v. Garrett, 744 F. Supp. 199 (D. Ariz. 1989), aff'd, 904 F.2d 41 (9th Cir.), cert. denied, 498 U.S. 982 (1990), and Moses v. Phelps Dodge Corp., 818 F. Supp. 1287 (D. Ariz. 1993). Plaintiffs also argue that grievance procedures did not apply to them because they were not current employees. Again, no authority supports their position. Plaintiffs also submit that the Arizona case law is erroneous regarding exhaustion of claims through the grievance process. None of these arguments constitutes any of the recognized grounds for setting aside the Court's decision on the Motion for Summary Judgment. Plaintiffs have not persuaded the Court that its judgment was based

upon manifest error of fact or law; that newly discovered or previously unavailable evidence would change the Court's opinion; that granting the Motion has created a manifest injustice; or that there has been an intervening change in the controlling law.

B. Plaintiffs' Motion for Leave to Amend its Motion to Alter or Amend Judgment

Exactly forty-four days after the Court rendered its decision on the Cross-Motions for Summary Judgment, Plaintiffs filed a Motion for Leave to Amend their Motion to Alter or Amend Judgment. It is clear that Plaintiffs filed this motion in an attempt to avoid the strict requirement that a motion under Rule 59(e) be filed within ten days after the entry of judgment.

A summary judgment cannot be disturbed after expiration of the thirty-day time for appeal. Fed. R. App. P. 4(a)(1). An exception is made, however, if a timely motion is made pursuant to Rule 59(e). The Plaintiffs have cited no authority and the Court can find none that would permit their proposed amendment to relate back to the filing of the original Motion to Alter or Amend the Judgment. What is more, Plaintiffs' allegations of newly discovered evidence and their reasons for not having presented this evidence previously are completely unavailing.

Plaintiffs argue that it was discovered in the companion case of Allen v. ITT Cannon, CIV 94-0267 PHX ROS, that the Defendants were engaged in a conspiracy to avoid the company's seniority program and that this information came to the Plaintiffs' attention after the Motion to Amend

the Judgment was filed. Plaintiffs have made no effort to explain why this new evidence could not have been presented to the Court earlier. It is noteworthy that Plaintiffs' counsel in the instant case is the same counsel in the companion Allen case. The Court notes that the litigation in the instant case had been pending for eighteen months, during which the Plaintiffs engaged in little or no discovery. It was not until fourteen months into the litigation and more than a week after briefing on the summary judgment issues that the Plaintiffs first raised discovery related to this new theory. Most important, as of March 6, 1995, Plaintiffs' counsel personally represented to the Court that all the discovery was completed in the instant case and that the case was ready to be scheduled for trial. Finally, the Court has since granted Defendant's Motion for Summary Judgment in the Allen case, finding no genuine issue of material fact regarding the allegation of conspiracy. That Order is annexed to this Order as Exhibit A.

In Williams v. Poulos, 11 F.3d 271 (1st Cir. 1993), the First Circuit upheld a district court decision to deny a motion to alter or amend a judgment where the motion sought relief that was not requested in the complaint. Concomitantly, in the instant case Plaintiffs seek to raise a cause of action for conspiracy and fraud, which was not alleged in the original Complaint.

Conclusion

Plaintiffs' Motion to Alter or Amend the Judgment and Motion for Leave to Amend the Motion to Alter or Amend is an attempt to relitigate old issues and to raise a new issue that was not within the parameters of the original Complaint. Accordingly,

IT IS HEREBY ORDERED denying Plaintiffs' Motion to Alter or Amend Judgment (Document No. 102).

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Leave to Amend its Motion (Document No. 111).

DATED this 4th day of March, 1996.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States District Judge

copies to all counsel of record

No. 99-235

(3)

FILED
SEP 29 1999
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

ROGER DEMASSE; MARIA A. GARCIA;
BILLY W. JONES; VIOLA MUNGUIA;
GREG PALMER; and SOCORRO SOZA
Petitioners,

v.

ITT CORPORATION, a Delaware
corporation, dba ITT CANNON
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Second Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

I. Interlocutory Issues May Be Reviewed:

Although there has been no final judgment entered in this case on the substantive issues (i.e., Respondent's breach of contract), now that this case has been ordered remanded by the 9th Circuit to the U. S. District Court for a trial, a decision on whether Petitioners are entitled to a trial by jury would, clearly, be far more beneficial to the parties if it were rendered now rather than following an appeal and review at the end of the entire case.

28 U.S.C. §1254 gives this Court jurisdiction to review by Writ of Certiorari interlocutory matters. Thus, in Nixon v. Fitzgerald, 457 U.S. 731 (1982); in Coleman v. Paccar, Inc., 424 U.S. 1301(1976); in Federal Power Commission v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976) and in Air Line Pilots Assoc., Intern. v. UAL Corp., 897 F.2d 1394 (7th Cir. 1990), it has been held that the Supreme Court may review interlocutory orders under its certiorari jurisdiction.

Proceeding in a manner suggested by Respondent would be a waste of judicial resources and expose the parties to needless additional expense with no corresponding benefit to either the parties or the judicial system. Petitioners have properly appealed a final decision of the U.S. District Court below denying their right to a trial by jury. They presented their issue to the Ninth Circuit, which entered its order affirming the U. S. District Court on the jury-trial issue. (See Appx. A of Petition)

It is submitted that, although the substantive issues in the case are still unresolved, the issues presented herein are uniquely ripe for review and decision now that Petitioners' case has been remanded for trial. The Constitutional issues and the proper interpretation of the Federal Rules of Civil Procedure need to be addressed at this time so that Petitioners and other litigants in our Federal judicial system will not be deprived of their Seventh Amendment rights and so that lower Federal courts can receive guidance from this Court on these issues of considerable importance.

II. The Affidavit Filed by Petitioners' Counsel:

In its brief in opposition, Respondent attempts to portray Petitioners' counsel below as one who intentionally attempted to deceive the trial court by filing a false affidavit. Such accusation is not only unsupported by the record, but, to the contrary, the Court below expressly found that counsel's affidavit *"did not appear to the Court to be an intentional false statement made under oath."* (See Appx. C, p. 6, f.n.1 of Petition). Furthermore, the record in this case shows that the basis for the Court's denial of Petitioners' request for a jury trial was clearly counsel's "inadvertence" in failing to comply with Rule 38(b) in a timely manner and not the inaccuracies in counsel's affidavit. (See Appx. C, p. 8-10, of Petition). Counsel's affidavit, which attempts to explain his forgetfulness, while inaccurate, was based upon his honest and best recollection of events occurring many months earlier. When the errors in the affidavit were brought to counsel's attention, a

detailed letter of explanation and apology was promptly sent to Judge Silver. (See Appx. A of this Brief).

III. Respondent's Accusation of Forum Shopping is Illogical:

Respondent's argument alleges that Petitioners were "forum shopping," i.e., that the failure of Petitioners to timely seek a trial by jury was a knowing, intentional, and purposeful waiver. Their theory is that Petitioners initially did not want a jury trial but, instead, wanted a trial to the Court before District Judge Roger G. Strand, who was initially assigned to this case. According to Respondent, when the case in the Court below was later transferred to District Judge Rosalyn O. Silver, Petitioners then decided they did not want their case decided by Judge Silver, but would rather have it decided by a jury.

Had this, in fact, been Petitioner's motivation, it would have been far easier for them to simply file a Motion under Rule 39(b) on the very grounds suggested by Respondents, rather than seek a jury trial on a claim of "inadvertence." It is

submitted that, under the circumstances of a sudden change of judge, a far more compelling argument could have been made for the granting of such relief than by relying on a claim of inadvertence. Petitioners' motivations are not nearly as complicated as Respondent believes. The simple truth of the matter is that Petitioners' counsel simply forgot to file a demand for a jury trial within the time limits imposed by Rule 38(b) and Petitioners believe they should not be denied their Seventh Amendment rights because of such unintentional, inadvertent conduct.

CONCLUSION

The record in this case fully supports an unintentional, inadvertent failure to comply with Rule 38(b). There would be no useful purpose served by the Court's rejection of the Petition herein merely because there is no final judgment on the substantive issues in this litigation. To the contrary, in view of the present posture of the case, it would be far better to resolve the issue of Petitioners' right to a jury trial before the case is

remanded for a trial, than after. Furthermore, in light of the divergent views among the Circuits, the issues raised herein have important implications for our Constitution, for the Federal rules of Civil Procedure, and for all civil litigants in our Federal judicial system. The Court should accept this Petition and bring resolution to these issues.

RESPECTFULLY SUBMITTED this 24th day of September, 1999.

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APPENDIX

A. LETTER TO JUDGE SILVER DATED APRIL 12, 1995

April 12, 1995

Judge Roslyn O. Silver
United States District Court
District of Arizona
6031 U.S. Court House
230 North 1st Avenue
Phoenix, AZ 85025-0006

Re: Betty L. Allen et al v. ITT Corporation, a Delaware corporation dba ITT Cannon
Cause No.: CIV 94-267 PHX ROS

Roger Demasse v. ITT Corporation, a Delaware corporation dba ITT Cannon
Cause No.: CIV 94-01399 PHX ROS

Dear Judge Silver:

As you might know I was terribly embarrassed by your bringing to my attention that there were two cases, Moon v. United Welfare and Risley v. UNAM Life, that had been filed in the U.S. District Court in 1993, wherein I had been the attorney of record and which I could not recall at the time I filed an Affidavit which stated that I had not practiced in the U.S.

District Court for at least 20 years before the filing of the Complaint in this case.

When I was confronted by the information that the Court had obtained from it's records, I, at first, thought that I must be losing my mind (or certainly my memory). The early signs of Alzheimer's occurred to me and I was really quite concerned and distressed about it. Recently I have discovered why this group of cases that you found in the records did not register with me at the time I was preparing my affidavit. My license was suspended from April 18 thru October 21, 1993 and I was not practicing during that period of time. The Moon v. United Welfare and the Risley v. UNAM Life were not filed by me, nor did I assume responsibility for these cases until January, 1994. (See attached pleadings) This period of time was one of greatly personal turmoil for me and in reflecting back over this it is difficult for me to actually remember much of anything that occurred, probably due to "emotional blocking" of memories arising out of my suspension that are, from a professional standpoint, terribly painful for me.

I began my involvement in the Allen and Demasse matters during the summer of 1993 while working as a Legal Assistant for attorney James Hill. After my reinstatement I continued to assist Mr. Hill in these cases and eventually became lead counsel.

As time passed and my memory concerning the sequence of events became somewhat blurred, it seemed to me that

because of my involvement in the Allen and Demasse matters in 1993, these cases had been filed before I became counsel of record in the Risley v. UNAM and the Moon v. United Welfare cases. Similarly, I believed that the Allen and Demasse cases had also been filed before Oliver v. Intel. Although, my memory was off it was off by only a few weeks in Moon and Risley, and only a few days in Oliver. (See attached pleadings)

Although I realize that the appearance of a reckless disregard for the truth may have been present when you merely compare my Affidavit with the filing dates of the cases that I have appeared in, however, when you examine the file in these cases you will see that my involvement in these cases did not take place until the early part of 1994. For example in CIV 93-1040-PHX-RGS, Risley v. Unam Life Insurance Company although this action was filed on June 1, 1993 it was filed by attorney James W. Hill, who remained the attorney of record in the case until January 16, 1994 when I was substituted. If you examine the Complaint in the Allen and Demasse cases you will see that I signed the Complaint on January 21, 1994 and with the passage of time and the blurring of my memory it seemed to me that my involvement in the Risley case came at or about the same time as my involvement in the Allen and Demasse cases.

In view of the Court's reaction to the attached Demand For Jury Trial filed by me in Miller v. State Farm, I believe the Court may have missed the point regarding my basis for requesting leave to file a late demand for trial by jury in this case.

I did not mean to suggest that I did not know about Rule 38(d), dealing with waiver of one's right to trial by jury by failing to file a timely demand, I was merely advising the Court that I temporarily forgotten about this requirement at the time I filed the Complaint in this particular case. Thus, it is submitted that the fact that I remembered to file a demand for a jury trial in Miller v. State Farm, does not in any way detract from my position that I was temporarily forgetful, but to the contrary, it would tend to strongly support it and to support the inference that this was merely an inadvertent waiver and not a knowledgeable and intentional waiver.

In any event I want to assure you that I did not intend to mislead the court or my adversary. It was simply a matter of a flawed memory due to a combination of unusual circumstances that lead me to believe that these cases were the first that I had handled in the U.S. District Court in many years.

I sincerely apologize to the Court for the errors in my Affidavit and for the dismay and disappointment that I know this must have caused you and I hope the court will have the compassion to forgive me.

I am at this point very concerned about the impact that all of this may have on the Courts ability to impartially judge my client's cases, particularly, in view of the courts denial of my clients' Request for a Trial by Jury. If there is any doubt at all about this issue in the Court's mind I would feel obliged to

withdraw so that my client's rights will not be prejudiced in any way by these events.

Sincerely yours,

Jack Levine

JL/gc
Enclosures
cc: Teresa Forest, Esq.